LIBRARY
SUPREME COURT, U. S.

FILE
JAN 17 19

No. 73 - 1 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL HELIUM CORPORATION, CITIES SERVICE HELEX, INC., PHILLIPS PETROLEUM COMPANY, *Petitioners*

v.

ROGERS C. B. MORTON, Secretary of the Interior, and ELBURT F. OSBORN, Director, Bureau of Mines, Department of the Interior

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT L. ACKERLY
RAYMOND S. E. PUSHKAR
SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C., 20006

EMMET A. BLAES
JOCHEMS, SARGENT & BLAES
200 East First Street
Wichita, Kansas 67201

Attorneys for Petitioner, National Helium Corporation

Of Counsel:

WENDELL J. DOGGETT
General Counsel &
Secretary
National Helium
Corporation
P. O. Box 1642
Houston, Texas 77001

(See page 2 of cover for additional counsel.)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

Of Counsel:

R. PRICE HOWARD
Senior Counsel
Phillips Petroleum
Company
Bartlesville, Oklahoma
74003

WILLIAM H. ALLEN
EUGENE D. GULLAND
COVINGTON & BURLING
888 Sixteenth Street, N. W.
Washington, D. C. 20006

JOSEPH W. KENNEDY
MORRIS, LAING, EVANS,
BROCK & KENNEDY,
CHARTERED
Suite 430
200 West Douglas
Wichita, Kansas 67202

Attorneys for
Petitioner, Phillips
Petroleum Company

ROBERT L. ACKERLY
RAYMOND S. E. PUSHKAR
SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C., 20006

WILLIAM S. RICHARDSON
ADAMS, JONES, ROBINSON AND
MALONE, CHARTERED
P. O. Box 1034
Wichita, Kansas 67201

DANIEL R. HOPKINS
P. O. Box 25128
Oklahoma City, Oklahoma
73125

Attorneys for
Petitioner, Cities Service
Helex, Inc.

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. The Court of Appeals' Ruling that the District Court was Without Jurisdiction to Engage in Substantive Review of Agency Action Under the National Environmental Policy Act, is in Conflict With Decisions of the First, Fourth, Seventh and Eighth Circuits 11

II. The Court of Appeals Ruling That Review of the Substantive Agency Decision was not Available Under the Administrative Procedure Act Conflicts with Decisions of the Second, Fourth, Fifth, and District of Columbia Circuits 15

III. The Court of Appeals Applied a Standard of Judicial Review of Impact Statements Under NEPA that Conflicts with the Standard Applied by Other Circuits 22

CONCLUSION 26

CITATIONS

CASES:

Ballerina Pen Co. v. *Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970) 16

Blackhawk Heating & Plumbing Co. v. *Driver*, 433 F.2d 1137 (D.C. 1970) 16

Calvert Cliff's Coordinating Committee v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971) 13, 14, 23, 25

Camp v. *Pitts*, 411 U.S. 138 (1973) 7

Page

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 8, 14, 15, 19, 22
Committee for Nuclear Responsibility v. *Seaborg*, 463 F.2d 783 (D.C. Cir. 1971) 24
Committee for Nuclear Responsibility v. *Seaborg*, 463 F.2d 788 (D.C. Cir. 1971) 24
Commonwealth of Pennsylvania v. *Lynn*, 362 F. Supp. 1363 (D.D.C. 1973) 16
Conservation Council of North Carolina v. *Froehlke*, 473 F.2d 664 (4th Cir. 1973) 11, 14, 16
Ely v. *Velde*, 451 F.2d 1130 (4th Cir. 1971) 11
Environmental Defense Fund, Inc. v. *Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972) 11, 13
Environmental Defense Fund v. *Froehlke*, 477 F.2d 1033 (8th Cir. 1973) 16
Environmental Defense Fund v. *Froehlke*, 473 F.2d 346 (8th Cir. 1972) 14, 25
Estrada v. *Ahrens*, 296 F.2d 690 (5th Cir. 1961) 16
Gould, Inc. v. *Chafee*, 450 F.2d 667 (D.C. Cir. 1972) .. 16
Greene County Planning Board v. *FPC*, 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972).. 23
Hanley v. *Kleindienst*, 471 F.2d 823 (2d Cir. 1972) .. 14, 16
Hopewell Township Citizens I-95 Committee v. *Volpe*, 482 F.2d 376 (3d Cir. 1973) 16
Indian Lookout Alliance v. *Volpe*, 484 F.2d 11 (8th Cir. 1973) 16
Jones v. *Lynn*, 477 F.2d 885 (1st Cir. 1973) 16
Kletschka v. *Driver*, 411 F.2d 436 (2d Cir. 1969) 16
Larson v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949) 15, 20, 21
Littel v. *Morton*, 455 F.2d 1207 (4th Cir. 1971) 16
Local 2677, American Federation of Government Employees v. *Phillips*, 358 F. Supp. 60 (D.D.C. 1973) 16
Monroe County Conservation Council, Inc. v. *Volpe*, 472 F.2d 693 (2d Cir. 1972) 16
Motah v. *United States*, 402 F.2d 1 (10th Cir. 1968) .. 21
National Council of Community Health Centers v. *Weinberger*, 361 F. Supp. 897 (D.D.C. 1973) 16
National Resources Defense Council, Inc. v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972) 26
Northern Helex Co. v. *United States*, 455 F.2d 546 (Ct. Cl. 1972) 18, 19

Page

Pace Co. v. *Resor*, 344 F.Supp. 787 (W.D. Tenn. 1971), reversed on other grounds, 453 F.2d 890 (6th Cir. 1971) 16
Pealo v. *Farmers Home Administration*, 361 F. Supp. 1320 (D.D.C. 1973) 16
Seanwell Laboratories, Inc. v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) 16
Scherr v. *Volpe*, 466 F.2d 1027 (7th Cir. 1972) 16
Sierra Club v. *Froehlke*, 486 F.2d 946 (7th Cir. 1973) .. 14
Silva v. *Lynn*, 482 F.2d 1282 (1st Cir. 1973) 14, 16, 24
Silva v. *Romney*, 473 F.2d 287 (1st Cir. 1973) 16
State Highway Commission v. *Volpe*, 479 F.2d 1099 (8th Cir. 1973) 16
Steinthal & Co., Inc. v. *Seamans*, 455 F.2d 1289 (D.C. Cir. 1971) 16
Wells v. *Roper*, 246 U.S. 335 (1918) 21
Wheelabrator Corp. v. *Chafee*, 455 F.2d 1306 (D.C. Cir. 1971) 16
Wyoming Outdoor Coordinating Council v. *Butz*, 484 F.2d 1244 (10th Cir. 1973) 16

STATUTES:

Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.* (1970)
5 U.S.C. § 701(a)(2) 19
5 U.S.C. §§ 702-706 ..... 3, 21
5 U.S.C. § 706(2)(A) 2, 8, 17, 22, 25
5 U.S.C. § 706(2(C) 17

Helium Act, 43 Stat. 1110, as amended, 74 Stat. 918, 50 U.S.C. §§ 167 *et seq.* (1970)
Generally 3, 4, 17
50 U.S.C. § 167h 15

National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. §§ 4321 *et seq.* (1970)
Generally 2, 3, 6, 17
42 U.S.C. § 4331(b)(1) 15

LEGISLATIVE MATERIALS:

S. Rep. No. 1814, 86th Cong., 2d Sess. (1960) 3
H.R. Rep. No. 1552, 86th Cong., 2d Sess. (1960) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

NATIONAL HELIUM CORPORATION, CITIES SERVICE HELEX, INC., PHILLIPS PETROLEUM COMPANY, *Petitioners*

v.

ROGERS C. B. MORTON, Secretary of the Interior, and ELBURT F. OSBORN, Director, Bureau of Mines, Department of the Interior

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners National Helium Corporation, Cities Service Helex, Inc., and Phillips Petroleum Company respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix pp. 1a-19a) is reported at 486 F.2d 995. The opinion of the District Court for the District of Kansas (Appendix pp. 19a-73a) is reported at 361 F.Supp. 78.

Opinions of these courts at an earlier stage of this litigation are also reproduced in the Appendix at pp. 73a-83a and 83a-96a, and are reported at 455 F.2d 650 and 326 F.Supp. 151, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in judicial review of federal agency action a court measuring compliance with the National Environmental Policy Act properly limits itself to a determination only of whether the agency prepared an adequate environmental impact statement.

2. Whether the federal courts have jurisdiction to review, pursuant to the judicial review section of the Administrative Procedure Act, an agency decision to terminate an important conservation program, on grounds other than compliance with the procedural requirements of the National Environmental Policy Act.

3. Whether in the review of the adequacy of an environmental impact statement prepared pursuant to the National Environmental Policy Act a court properly asks only whether, on the face of the statement, the agency preparing the statement made "an objective good faith effort to comply with the statutory procedural requirements," or whether, on the other hand, the court should engage in the "thorough, probing, in-depth review" of the statement required under the "arbitrary and capricious" standard of review provided for in 5 U.S.C. § 706(2)(A).

STATUTES INVOLVED

The relevant provisions of the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. §§ 4331, et seq., Helium Act, 42 Stat. 1110, as amended, 74 Stat. 918, 50 U.S.C. §§ 167a, et seq. and the Administrative Procedure Act, 5 U.S.C. §§ 702, 703, 704, 706, are set forth in the Appendix to this Petition (pp. 120a-139a).

STATEMENT OF THE CASE

This case arises from the issuance in January 1971 of notices terminating the contracts of four companies that were extracting helium from natural gas and supplying it to the Government for storage and conservation in accordance with the helium conservation program established by the Department of the Interior pursuant to the Helium Act Amendments of 1960.

The Helium Conservation Program

Helium, the subject of the prematurely terminated conservation program and of this case, is an extraordinary element with exceptional characteristics, some of them unique.[1]

---

[1] Its value has long been recognized. The first important use of helium was as a lifting gas for lighter-than-air ships. That and uses associated with medicine and deep-sea diving were virtually its only uses until World War II. (App. 23a-25a). Since World War II many other more advanced and complex applications of helium have been discovered and put into practices. (App. 25a-26a). By 1960, the annual consumption of helium was 80 times what it had been in 1937. In 1960, helium was authoritatively described as "essential to our missile and atomic energy programs and . . . increasingly valuable as industrial material." At that time it was said that "the new field of cryogenics involving extremely low temperatures in the region of absolute zero opens up exciting new frontiers of science." S. Rep. No. 1814, 86th Cong., 2d Sess. 2 (1960); see also H.R. Rep. No. 1552, 86th Cong., 2d Sess. 2-3 (1960).

Helium has the unique properties of inertness, of not liquifying until a temperature just above absolute zero is reached, and of remaining liquid down to absolute zero. These properties make helium essential—there is no known practical substitute—to the creation of very low temperatures and thus the recognized key to the development of critical new and economic methods of power generation and transmission that will have to be put to use as fossil fuel runs out. These methods include magnetohydrodynamic power generation, power generation by nuclear fusion and superconducting power transmission. (App. 23a).

Helium that can be economically extracted and used is found only in association with natural gas. Helium-rich natural gas has been found in significant quantities in the United States only in the Hugoton-Panhandle fields of Kansas, Oklahoma and Texas, which contain 99 percent of the nation's known helium reserves. (App. 26a). As the gas is extracted for use as fuel, the gas is consumed, and the helium, which is not combustible, is wasted into the atmosphere unless steps are taken to conserve it. Because of the demand for fuel, the gas and the helium will be gone well before the end of this century. (App. 26a-27a).

A national program for conserving helium first came under serious consideration in the late 1950's. An interdepartmental study concluded that helium should be conserved (App. 25a-28a). Soon thereafter, in 1960, Congress enacted amendments to the Helium Act of 1925, specifically authorizing a conservation program. 74 Stat. 918 (App. 28a-29a).

As authorized by the amended Helium Act, the Secretary chose to implement the conservation program by

contracting [2] with four companies to extract and supply to the Government crude helium from the Hugoton-Panhandle Field to be stored for future use. (App. 30a). The helium conservation program based on these contracts was intended to be self-liquidating. Outlays for the acquisition of helium in the early years were to be repaid with interest as the Government sold helium from storage in later years.

The helium conservation program has been criticized over the years by financially oriented government officials who have been unable or unwilling to appreciate the full implication of the fact that some day there will be no more helium to be economically recovered from natural gas. In addition, the curtailment of the space program has diminished the current governmental demand for helium, and the Government's helium program has suffered financially from the inroads of private helium producers into the current helium market.

The First Termination

The Department of the Interior in 1970 undertook negotiations with the contractors looking toward a conservation program that would be less expensive to the Government. (App. 32a). These negotiations were

[2] Each of the contracts, entered into in 1961, extends to 1983 but contains a clause allowing the Government to terminate the contract if, "in the opinion of the Secretary of the Interior, the discovery of large new helium resources or a substantial diminution in helium requirements or any circumstance of similar nature should occur which would make the continued operation of [the contractor's] plant and the continued purchase of helium-gas mixture extracted therein unnecessary to accomplish the purposes of the [Helium] Act or any amendment thereto . . . ." (App. 33a, 75a). (The quotation is from the contract of petitioner National Helium Corporation. The other contractual termination clauses are substantially identical.)

still in progress when the notices of termination of the contracts were served in January, 1971. Documents that subsequently came to light made it clear that, until very shortly before the termination notices were issued, the Department had urged continuation of the helium program and that it was *not* the Secretary of the Interior who decided upon termination but officials in the Office of Management and Budget. (App. 33a, 55a).

After receiving the notices of termination and unsuccessfully asking for reconsideration, three of the contractors, petitioners here, brought suit in the District Court for the District of Kansas to enjoin the termination of the conservation program, naming as defendants the Secretary of the Interior and the director of the Bureau of Mines, respondents here,[3] asserting not merely a private interest but the interest of the public in the conservation of a wasting natural resource.

On petitioners' motions the District Court temporarily enjoined the termination of the program. It did so principally on the ground of the agency's failure to comply with Section 102(2)(C) of the National Environmental Policy Act. No environmental impact statement had been prepared in advance of the termination of the conservation program even though Section 102(2)(C) requires such a statement in the case of any proposal for any major federal action significantly affecting the quality of the human environment. The Court of Appeals affirmed. (App. 73a-83a) Respondents at that point did not seek review in

[3] The fourth contractor, Northern Helex Company, had elected already to treat its contract as breached by nonpayment and had brought suit in the Court of Claims for damages. (See p. 19, fn. 13.

this Court or a trial on the merits. Instead, they undertook to prepare and publish an environmental impact statement, which was accomplished in November, 1972.

The Second Termination

Several rounds of pleadings and hearings in the District Court and interlocutory appeals in the Court of Appeals followed the issuance of the impact statement. The upshot was that the Secretary of the Interior on February 2, 1973, issued new notices of termination of the three contracts. (App. 33a-34a) The outstanding preliminary injunction remained in effect, and these notices therefore did not become effective in the prescribed 60 days pending review of their validity.

Judicial Review

A. The District Court

Petitioners filed verified amended complaints challenging the attempted new termination, reiterating certain of their original allegations of illegality relating to the inconsistency of the termination with the relevant provisions of the contracts themselves, with the Helium Act and with the duty of the Secretary of the Interior and not OMB to make any termination decision; and alleging further that the Secretary had still not complied with NEPA because the impact statement relating to the termination did not satisfy the statute, and that the termination of the helium conservation program was not consistent with the environmental values identified in the impact statement. The Court of Appeals directed the District Court to proceed to determine the case forthwith and to do so, in accordance with the court's reading of this Court's opinion in *Camp* v. *Pitts,* 411 U.S. 138 (1973), solely on the

basis of the administrative record and without an evidentiary hearing on the merits of the amended complaints.[4]

On that record and on briefs and oral argument of the parties, the District Court ruled on June 11, 1973, that the decision to terminate the Helium Conservation Program was arbitrary, capricious, and abuse of discretion and otherwise not in accordance with law because there had not yet been compliance with the procedural and substantive mandates of NEPA. The court continued the preliminary injunction in effect pending further order of the court to give the agency the opportunity to comply with NEPA. (App. 72a-73a).

Following the directive of this Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-16 (1971), that in the application of the "arbitrary and capricious" standard of review enunciated in 5 U.S.C. §706(2)(A) there should be "a substantial inquiry . . . a thorough, probing, in-depth review . . . [an] inquiry into the facts [that] is to be searching and careful," the District Court found the assessment and consideration of environmental factors evidenced in the impact statement and the Secretary's statement of reasons for terminating the conservation program "woefully inadequate". (App. 51a-68a)

The District Court found it unnecessary to decide the other issues petitioners had raised, notably the legality of the termination under the Helium Act. However, the court ruled that it had jurisdiction to determine these issues, contrary to the position taken by respondents. (App. 41a-42a).

---

[4] "The hearing in the district court consisted of judicial review of the administrative record. It was not a trial *de novo*. (This was in accordance with the adjudication of this court after the mentioned interlocutory appeals)." (App. 4a).

B. The Court of Appeals

The Court of Appeals reversed and remanded with directions to dismiss the complaints. It limited itself to a review of the impact statement and in making that review rejected the "arbitrary and capricious" standard applied by the District Court. Instead, it assessed the impact statement on its face against a standard of whether the agency had made "an objective good faith effort to comply with the statutory procedural requirements,[5] a test that it elsewhere described as a "rule of reason." There is no statutory basis for this standard of judicial review. By this standard, the impact statement was inevitably found not wanting for, of course, some kind of "effort" at compliance with NEPA had quite evidently been made. The Court of Appeals also rejected the District Court's conclusion that review of the termination action could be had under the Administrative Procedure Act on grounds other than failure to comply with the procedural requirements of NEPA (App. 8a)

REASONS FOR GRANTING THE WRIT

In its practical effect the decision below is of the greatest significance. A foresighted program of conserving the invaluable, scarce and wasting resource, helium, adopted more than a decade ago pursuant to

---

[5] The Court of Appeals delineated its review as, "In summary, then, our view is that the review of the FES is limited to the following: (1) Whether FES discusses all of the five procedural requirements of NEPA. (2) Whether the environmental impact statement constitutes an objective good faith compliance with the demands of NEPA. (3) Whether the statement contains a reasonable discussion of the subject matter involved in the five required areas." (App. 12a).

Congressional authorization and direction, is abandoned.[6]

Abandonment of this program has been permitted without the kind of judicial inquiry into the legality of the agency action terminating it that is required by decisions of this Court and of other courts of appeals, including in various aspects, the First, Second, Fourth, Fifth, Seventh, Eighth and District of Columbia Circuits. Because the several conflicts relate to important and recurring questions of federal law, the decision of the Court of Appeals for the Tenth Circuit should be reviewed by this Court.

Judge Breitenstein, in a concurring opinion, acknowledged one of the conflicts explicitly. He said:

> "I reject, and I believe the majority opinion rejects, the apparent holdings of the Eighth and Fourth Circuits that an environmental impact statement is judicially reviewable on its merits to determine sufficiency." (App. 18a).

The question whether an impact statement is reviewable "on its merits to determine sufficiency" or whether, as the court below held, a good faith effort at

---

[6] Abandonment of the conservation program, ironically, coincides with the abrupt and forceful coming to public awareness of an energy crisis that, we are told, will be a chronic condition until sources of energy other than fossil fuels are developed for practical application. The irony lies in the fact that among the most promising substitutes for fossil fuels are methods of power generation—nuclear fission and fusion and the even more exotic method called magnetohydrodynamics—that, in the present state of our knowledge, require helium with its singular behavioral characteristics at very low temperatures. Those characteristics also make helium uniquely suitable for inducing superconductivity in metals so as to create greater efficiency in the transmission of energy produced from whatever sources are available.

compliance with the impact statement requirement is enough is the third of three important federal questions presented and dealt with hereinbelow. (pp. 22-26, *infra*).[7] The other two questions arise from the actions of the Court of Appeals in (1) limiting its review of agency action to determining "compliance with the [NEPA] requirement of the environmental impact statement" and (2) dismissing without consideration other and substantial questions raised concerning the validity of the challenged agency action.

I.

The Court of Appeal's Ruling That the District Court Was Without Jurisdiction To Engage in Substantive Review of Agency Action Under the National Environmental Policy Act Is in Conflict With Decisions of the First, Fourth, Seventh and Eighth Circuits.

The Court of Appeals correctly reaffirmed in the decision below its ruling on the earlier appeal from the preliminary injunction of 1971 that the District Court had jurisdiction to determine agency compliance with NEPA. (App. 5a-6a; 455 F.2d at 653-54). But it limited review in a manner that conflicts with decisions of other courts of appeals.

---

[7] Judge Breitenstein cited for the "apparent holdings" of the Fourth and Eighth Circuits on reviewability of impact statements, *Environmental Defense Fund* v. *Corps of Engineers*, 470 F.2d 289, 298 (8th Cir. 1972), and *Conservation Council of North Carolina* v. *Froehlke*, 473 F.2d, 664, 665 (4th Cir. 1973). In fact, those cases, discussed in the text of this Petition below, relate at the pages cited to review of the substantive agency decision for compliance with NEPA, not review of the impact statement. But both courts have reviewed or called for review of impact statements on the "merits" to determine sufficiency" in the way that Judge Breitenstein and his brethren eschewed. See *Environmental Defense Fund* v. *Froehlke*, 473 F.2d 346, 348-52 (8th Cir. 1972); *Ely* v. *Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971).

The District Court conducted a properly careful examination of the impact statement in making its NEPA review and found it unnecessary to go further. There was no need to "reach the propriety of the Secretary's actual decision to terminate" because the inadequacies of the impact statement made it impossible for the Secretary to have sensibly balanced adverse environmental impacts against the benefits of his proposed actions as NEPA substantively requires. (App. 42a.)

The Court of Appeals, viewing the impact statement against a far too uncritical standard, found it adequate—and stopped there. It did not make the further inquiry required of it once it had ruled that the necessary condition precedent to valid agency action was satisfied by the impact statement. That inquiry is into whether the action itself, the decision to terminate the conservation program, reflected the the balancing of environmental and other values that NEPA requires. The court was explicit on this point. It said that its review was "strictly limited to compliance with the requirement of the environmental impact statement," that "the only issue giving the district court jurisdiction to entertain the injunction suit was non-compliance with the requirement of an impact statement." (App. 8a, 6a,). While it said that this review "includes consideration given to the statement by the Secretary," it did not, on the face of its opinion, actually probe the extent, if any, of the consideration of the impact statement. Much less did it inquire into whether the Secretary's consideration of the environmental factors entering into his decision satisfied the substantive standards of NEPA.

In so limiting NEPA review, the court ruled in a way that squarely conflicts with decisions of at least four other courts of appeals.

The leading decision is that of the Eighth Circuit in *Environmental Defense Fund* v. *Corps of Engineers,* 470 F.2d 289 (8th Cir. 1972). The court there held:

> "Given an agency obligation to carry out the substantive requirements of . . . [NEPA] we believe that courts have an obligation to review substantive agency decisions on the merits." *Id.* at 298.

It later explained what it meant by review on the merits.

> "Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine, according to the standards set forth in §§101(b) and 102(1) of the Act, whether the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." *Id.* at 300, quoting from *Calvert Cliffs' Coordinating Committee* v. *AEC,* 449 F.2d 1109, 1115 (D.C.Cir. 1971).

The court proceeded to engage in the type of review suggested in the foregoing quotation. *Id.* at 301. While it sustained the agency action in the case, the court subsequently reversed a district court decision in favor of an agency in a NEPA case and made unmistakable its view that the district courts have an obligation "to review agency decisions on the merits to determine if they are in accord with NEPA."

Environmental Defense Fund v. *Froehlke,* 473 F.2d 346, 353 (8th Cir. 1972).

The Fourth Circuit has followed these rulings of the Eighth Circuit and has reversed a district court judgment in a NEPA case on the sole ground that the district court erred in not engaging in "a 'substantial inquiry' to determine whether there has been a clear error of judgment" on the merits of the agency decision. *Conservation Council of North Carolina* v. *Froehlke,* 473 F.2d 664, 665 (4th Cir. 1973).

The Seventh Circuit in *Sierra Club* v. *Froehlke,* 486 F.2d 946 (7th Cir. 1973), held that:

> "an agency's decision should be subjected to a review on the merits to determine if it is in accord with substantive requirements of NEPA. The review should be limited to determining whether the agencies' decision is arbitrary or capricious. 'The Court is not empowered to substitute its judgment for that of the agency,'" quoting from *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971).

See also *Calvert Cliffs' Coordinating Committee* v. *AEC,* 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Hanley. Kleindienst* 471 F.2d 823 (2nd Cir. 1972), and *Silva* v. *Lynn,* 482 F.2d 1282 (1st Cir. 1973).

The conflict between the decision below and the decisions of these other courts of appeals is square and unavoidable. The question, simply put, is whether review of agency action under NEPA ends with a determination that a procedurally adequate impact statement has been prepared and includes no inquiry into whether the agency has given full consideration to environmental values including alternatives to the proposed action or whether the environ-

mental considerations revealed by the statement have properly entered into the agency decision to which the impact statement relates. This question of the scope of review in NEPA cases arises here in the context of a truly major federal action that will significantly affect the quality of the human environment and of human life for years to come.[8] The case is therefore an appropriate vehicle for resolving the conflict. This Court should grant review.

II.

The Court of Appeals' Ruling That Review of the Substantive Agency Decision Was Not Available Under the Administrative Procedure Act, Conflicts With Decisions of the Second, Fourth, Fifth and District of Columbia Circuits.

The court below denied review of the termination of the helium conservation program on any ground other than procedural compliance with NEPA. The Helium Act, supra, provides in part that the Administrative Procedure Act shall apply to any agency proceeding and any agency action taken under the Act. 50 U.S.C. Sec. 167h. Nevertheless the Court below refused to review the termination of the program relying principally upon *Larson* v. *Domestic & Foreign Commerce Corporation,* 337 U.S. 682 (1949). To the extent that the *Larsen* decision precludes judicial review of agency action it is in conflict with the Administrative Procedure Act, the apparent position of this Court as reflected in decisions such as *Citizens to Preserve Overton Park* v. *Volpe, supra,* and a host of lower court decisions which have consistently re-

---

[8] A cardinal purpose of NEPA is ". . . that the Nation may—(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations . . . ." 42 U.S.C. § 4331(b)(1).

viewed agency action under the Administrative Procedure Act.[9] The NEPA contains no provisions for judicial review, yet federal courts have unhesitatingly reviewed agency compliance with the Act, granting injunctive relief where non-compliance was apparent.[10]

Petitioners' principal contention relating to the merits of the decision to terminate the helium conservation program is that the termination was incon-

---

[9] *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970); *Kletschka* v. *Driver*, 411 F.2d 436 (2d Cir. 1969); *Littell* v. *Morton*, 455 F.2d 1207 (4th Cir. 1971); *Estrada* v. *Ahrens*, 296 F.2d 690 (5th Cir. 1961); *Ballerina Pen. Co.* v. *Kunzig*, 433 F.2d 1204, 1207, 1211 (D.C. Cir. 1970); *Blackhawk Heating & Plbg. Co.* v. *Driver*, 433 F.2d 1137, 1140 (D.C. Cir. 1970); *Steinthal and Co., Inc.* v. *Seamans*, 455 F.2d 1289 (D.C. Cir. 1971); *Wheelabrator Corp.* v. *Chafee*, 455 F.2d 1306 (D.C. Cir. 1971); *Gould, Inc.* v. *Chafee*, 450 F.2d 667, 668 (D.C. Cir. 1972); *Pace Co.* v. *Resor*, 344 F. Supp. 787 (W.D. Tenn. 1971), reversed on other grounds, 453 F.2d 890 (6th Cir. 1971); *State Highway Commission* v. *Volpe*, 479 F.2d 1099, 1105 n.7 (8th Cir. 1973); *Local 2677, American Federation of Government Employees* v. *Phillips*, 358 F. Supp. 60 (D.D.C. 1973); *National Council of Community Health Centers* v. *Weinberger*, 361 F. Supp. 897 (D.D.C. 1973); *Pealo* v. *Farmers Home Administration*, 361 F. Supp. 1320 (D.D.C. 1973) and *Commonwealth of Pennsylvania* v. *Lynn*, 362 F. Supp. 1363 (D.D.C. 1973).

[10] *Scherr* v. *Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Hanley* v. *Kleindienst*, 471 F.2d 823 (2d Cir. 1972); *Monroe County Conservation Council, Inc.* v. *Volpe*, 472 F.2d 693 (2d Cir. 1972); *Conservation Council of North Carolina* v. *Froehlke*, 473 F.2d 665 (4th Cir. 1973); *Silva* v. *Romney*, 473 F.2d 287 (1st Cir. 1973); *Environmental Defense Fund, Inc.* v. *Froehlke*, 477 F.2d 1033 (8th Cir. 1973); *Jones* v. *Lynn*, 477 F.2d 885 (1st Cir. 1973); *Silva* v. *Lynn*, 482 F.2d 1282 (1st Cir. 1973); *Hopewell Township Citizens I-95 Committee* v. *Volpe*, 482 F.2d 376 (3d Cir. 1973); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244 (10th Cir. 1973) and *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11 (18th Cir. 1973).

sistent with the provisions and intent of the Helium Act, particularly when those provisions are interpreted, as they must be "to the fullest extent possible," in accordance with the policies set forth in NEPA.[11] The argument in brief is: Congress by the Helium Act Amendments of 1960 authorized the Secretary of the Interior to embark on a program of conserving helium; implicitly he was necessarily authorized to terminate any such program when it had fulfilled its purpose; the Secretary entered into the helium supply contracts that constitute the conservation program and provided in each of them for termination when, on his judgment, the conservation purposes of the Helium Act have been fulfilled (p. 5, n. 2, *supra*); unless the circumstances set forth in the contractual termination clauses exist and lead the Secretary rationally to the judgment that those purposes have been fulfilled, he has neither contractual nor statutory authority to terminate the program; in fact, the circumstances do not exist, and therefore the Secretary's action in purporting to terminate the program is illegal.

---

[11] Section 102(1) of NEPA states that the Congress "authorizes and directs that, to the fullest extent possible: . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act . . ." When, as in the cases cited at pp. 13-14, *supra*, a court holds that agency action may be set aside as arbitrary, capricious or an abuse of discretion, 5 U.S.C. § 706(2)(A), for failure to comply with the substantive standards of NEPA, it presumably is relying on the requirement of administration in accordance with NEPA policies laid down in § 102(1). Petitioners chose to emphasize the requirement that public laws be interpreted in accordance with NEPA policies. On this view agency action that, without warrant, does not accord with NEPA policies would be set aside as "in excess of statutory jurisdiction, authority, or limitations . . .," 5 U.S.C. § 706(2)(C). Different ways of stating substantially the same claim should not affect the standard of review.

Apart from a conclusory, afterthought statement of the Court of Appeals that "we fail to perceive any violation of the 1960 Helium Act Amendments," which clearly does not suffice to dispose of a serious, substantial legal argument, petitioners have not been heard on this claim.[12]

The Court of Appeals' discussion of why petitioners could not be heard on this claim is confused. Whatever the court intended as its reasons, however, the important question raised by its effectively depriving petitioners of their day in court is important enough to to warrant review and resolution by this Court.

First, the court said in its original opinion affirming the preliminary injunction that, aside from NEPA considerations, the termination action was one entirely

---

[12] Nor have they been heard on their claim that the termination was illegal because the Secretary did not decide to terminate but instead the decision was made for him by officials of the Office of Management and Budget. To this claim the Court of Appeals made the wholly unresponsive answer that "the Office of Management and Budget does not have the authority to dictate to the Secretary the decision that he is to make in connection with a contract entered into and terminable by him." (App. 16a). The court's statement is true, and it is indeed the heart of petitioners' claim of illegality on this score. But it only states the issue, not the resolution of it. The court mistook a statement of a legal conclusion for a statement of what in fact happened. The District Court did not have to reach the issue of termination by an unauthorized official. The indications that the OMB dictated the first termination of the conservation program in 1971 were disclosed as a result of the trial process in the Court of Claims in *Northern Helex Co.* v. *United States*, 455 F.2d 546 (Ct. Cl. 1972). Petitioners urged below that, were the issue to be reached, they could not be restricted to argument on the administrative record but must have an evidentiary trial to ascertain OMB's role in the 1973 termination. The effect of the Court of Appeals' judgment in this respect is to deprive petitioners of a trial to which they were entitled on the undenied allegations of their verified amended complaints.

within the discretion of the Secretary. 455 F.2d at 653 (App. 75a). In the decision below it adhered to its views that "the Secretary was not compelled to purchase any helium; that the matter was left to his discretion and he was within his rights in terminating the contracts." If this was intended as a statement that agency action respecting helium conservation is so far "committed to agency discretion by law" that, according to 5 U.S.C. § 701(a)(2), review of the action cannot be had, it is obviously inconsistent with this Court's opinions in *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra* at 410 (1971).

In *Overton Park*, this Court said that the "committed to agency discretion" exception to the general rule of reviewability under the Administrative Procedure Act is a very narrow one, limited to those cases in which "there is no law to apply." In this case there plainly is law to apply in the Helium Act as that statute is illuminated by the policies of NEPA.[13]

---

[13] Indeed, neither in this case nor in a very significant related case has the Secretary argued that he has untrammeled discretion to terminate the contracts whenever and in whatever circumstances he wishes. The related case is the suit of the fourth helium supply contractor for damages in the Court of Claims based upon the Government's failure to pay for helium before the attempted 1971 termination of the contracts. The Court of Claims found a breach by virtue of nonpayment. *Northern Helex Co.* v. *United States*, 455 F.2d 546 (Ct. Cl. 1972). The case is awaiting the decision of a Court of Claims trial judge on the issue of damages. The Government in its argument in that case that the subsequent 1971 termination limits the damages for which it is liable to those sustained before the termination, acknowledges that to be valid, the termination must have been based on a rationally supported judgment that the purchase of helium was no longer necessary to achieve the purposes of the Helium Act. The argument there is over the breadth of the "purposes" of the statute that must have been fulfilled to justify termination. Thus, the suggestion of the court below that there is no law to apply is untenable, even on respondents' view.

A second possible basis for the Court of Appeals' decision to dismiss several of petitioners' claims without hearing is the suggestion in its opinion that injunctive relief cannot be had in a suit that arises in the context of a government contract. (App. 7a). The court, without explanation, excepted from its ban suits to compel compliance with the procedural commands of NEPA. (App. 8a). The erection of an otherwise impenetrable barrier to injunctive suits involving agency action is inconsistent with this Court's governing decisions. The court below invoked some of these decisions, including particularly *Larson* v. *Domestic & Foreign Commerce Corp., supra.* However, *Larson* and the other modern sovereign immunity cases stand squarely opposed to the proposition that there is any all-inclusive ban on equitable suits to redress grievances arising from government contracts.

Were there any such ban, *Larson* itself could have been decided very simply and without contributing as it has to the subtleties of sovereign immunity analysis. For in *Larson* there was a contract of sale, and the plaintiff there could have sued for damages in the Court of Claims. Instead of deciding the case on that ground, however, the Court engaged in a lengthy discussion in the course of which it set forth rules that still guide decisions—notably, for purposes of this case, the rule that, if an officer has acted beyond his statutory authority, he cannot invoke the sovereign's immunity to forestall judicial inquiry into his conduct.

In this case there are substantial allegations that contracts were terminated by officials acting in excess of their statutory authority. The fact that damages may be available to redress private wrongs under the Tucker Act because of such action does not prevent

courts from passing upon such allegations in an injunction suit to vindicate the public interest, which is otherwise trammeled by the agency action. Mr. Justice Frankfurter, dissenting in *Larson*, said in a statement to which the majority of the Court took no exception that "the general statute permitting suit in a Court of Claims in certain instances against the Government is not a statute that provides that remedies otherwise at the plaintiff's command are to be displaced." 337 U.S. at 722. To be sure, there are cases, such as *Wells* v. *Roper*, 246 U.S. 335 (1918), much relied on by respondents below, in which there is no significant public interest element in a government contract dispute and the Tucker Act damages remedy is therefore adequate for the redress of private wrongs. But that is obviously not this case. Here the public interest is gravely implicated.

Finally, the Court of Appeals said that "we reject the plaintiff's argument that review of the termination is permissible under the Administrative Procedure(s) Act." (App. 8a) If this statement was intended to add anything to what the court had already said by way of dismissal of petitioners' substantive claims, it was a reaffirmation of the Tenth Circuit's holding that Section 10 of the Administrative Procedure Act, now 5 U.S.C. §§ 701-706, is not a waiver of sovereign immunity as to agency action within its scope. See *Motah* v. *United States*, 402 F.2d 1 (10th Cir. 1968). That holding conflicts with decisions of the courts of appeals of four other circuits and several district courts that Section 10 is such a waiver.[14] This Court has not decided this question relating to the scope and

[14] See cases cited in footnotes 9 and 10 *supra*.

effect of Section 10 even though the APA is now more than a quarter-century old. It should resolve the conflict now.

III.

The Court of Appeals Applied a Standard of Judicial Review of Impact Statements Under NEPA That Conflicts With the Standard Applied by Other Circuits.

Aggravating the limited view it took of the scope of judicial review, the Court of Appeals applied an impermissibly lenient standard of review to the only thing it undertook to review at all, the impact statement.

In its consideration of the adequacy of the impact statement, the District Court applied the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A), with all that standard was said by this Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra* at 415-16 (1971), to imply in the way of a "substantial inquiry" and "a thorough, probing in-depth review." (App. 45a) In a long and thoughtful opinion, the District Court had regard not only to the face of the impact statement but also to the content of the statement—the full range of scientific and technical opinion on helium supply, helium uses and helium demand. It found that such material, readily available to the Interior Department, was ignored in many aspects of the impact statement.[15] (App. 51a-68a)

---

[15] Illustratively, the court found the statement flawed by its failure to discuss the disputed issue of whether alternative helium gas supplies would be available in the future (App. 65a-66a); its apparent obliviousness to the impact on developing energy and other technology of the future unavailability of helium, which is well-documented elsewhere (App. 56a-58a); and its lack of analysis of the environmental impact of alternative future helium recovery techniques (App. 58a-60a).

The Court of Appeals rejected the searching standard of review applied by the District Court and purported to follow "the better reasoned decisions," which it said permitted no more than a determination, based on the face of the impact statement, whether the agency made "an objective good faith effort to comply with the statutory procedural requirements." (App. 10a.) Such a standard of review, which the court elsewhere described as a "rule of reason," can find no support in any pertinent statute and far from according with "better reasoned decisions," conflicts with the decisions of other courts of appeals in reviewing NEPA impact statements.

Other circuits have undertaken a careful review to determine the sufficiency of impact statement on their merits. In doing so, these courts have not second-guessed "the scientists, experts, economists and planner who make the environmental statement," which Judge Breitenstein, in his concurring opinion acknowledging the conflict on this point (p. 10, *supra*), viewed as the necessary alternative to his court's lenient standard of review. (App. 18a.) Rather, they have acted to ensure that NEPA serves its purpose as an "action-forcing" statute, *Calvert Cliffs' Coordinating Committee* v. *AEC*, *supra* at 1113 (D.C. Cir. 1971), by carefully reviewing what the experts have written, in the light of what is known or can readily be ascertained about the subject of the statement, to see whether the statement is in fact the "single coherent and comprehensive environmental analysis," *Greene County Planning Bd.* v. *FPC*, 455 F.2d 412, 420 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972), called for by the statute. Only thus can there be any guarantee that the immediate decision-maker and the others for whom

impact statements are intended—themselves typically non-experts—have the benefit of the systematic laying out of environmental considerations affecting a proposed action. Only thus can there be assurance that the ultimate purpose of NEPA, described once by the Court below itself as a mandate "that action can be taken only following complete awareness on the part of the actor of the environmental consequences of his action," 455 F.2d at 656, is served.

The Court of Appeals for the District of Columbia Circuit has emphasized the duty of reviewing courts to determine whether the agency preparing an impact statement has properly included and considered in its analysis relevant technical and scientific opinion available to it that may conflict with its own views. That court has held that NEPA requires impact statements at the very least to identify and evince an awareness of significant conflicting scientific and technical opinion that is responsible and available to the agency. *Committee for Nuclear Responsibility* v. *Seaborg*, 463 F.2d 783, 787-88 (D.C. Cir. 1971); see also *Committee for Nuclear Responsibility* v. *Seaborg*, 463 F.2d 788, 795 (D.C. Cir. 1971). A standard of review limited to determining from the face of the impact statement whether there was a "good faith effort to comply with the statutory procedural requirements" is at odds with the rigorous standard of review that the District of Columbia Circuit and other circuits have raised.

Most recently, the First Circuit said in *Silva* v. *Lynn*, *supra* at 1283:

> "In identifying the source of review power courts have, as did the district court here, drawn on NEPA itself, 42 U.S.C. § 4331 et seq. and the general "federal question" power, 28 U.S.C. § 1331.

> We think an alternative source, equally applicable is the Administrative Procedure Act, 5 U.S.C.§ 702 and 706. In any event, the judicial inquiries are whether the agency's findings and conclusions in the EIS are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and whether the agency followed the procedures required by law."

The court found the impact statement there in issue to be *inadequate* in that it lacked sufficient discussion of alternatives and a reasoned basis for the choices made.

In operational terms, the court below in this case has adopted a standard that is satisfied by "a catalog of environmental facts," *Environmental Defense Fund* v. *Froehlke,* 473 F.2d 346, 351 (8th Cir. 1972), and an incomplete catalog at that.[16]

The District Court applied the standard of review of the Administrative Procedure Act, 5 U.S.C. § 706 (2)(A) and found glaring deficiencies in the impact statement. (App. 51a-68a). The Court of Appeals ignored the record below in a comment unrelated to the issues presented saying that "the statement did not have to dwell on the imaginary horribles posed by the plaintiffs." (App. 14a). The issues presented to the District Court and the Court of Appeals were, as required, supported solidly by the record in this case. To avoid review by a statement as quoted above permits an agency to completely circumvent NEPA which requires the agency, among other things, to

---

[16] The notion that NEPA is merely a full-disclosure law has been flatly rejected. So to construe NEPA would render it a "paper tiger". *Calvert Cliffs' Coordinating Committee* v. *AEC, supra.*

compare "the net balance [of benefits and environmental risks] for the proposed project with the environmental risks presented by alternative courses of action." *Natural Resources Defense Council, Inc.* v. *Morton,* 458 F.2d 827, 833 (D.C. Cir. 1972).

This Court should review the decision below to determine whether the standard for judging the adequacy of environmental impact statements is to be the lenient standard applied by the Tenth Circuit or the more rigorous standard applied by other Courts of Appeals. Only the latter, we submit, will ensure that impact statements serve the high purposes intended for them by Congress.

CONCLUSION

For the foregoing reasons the writ of certiorari prayed for should issue.

Respectfully submitted,

ROBERT L. ACKERLY
RAYMOND S. E. PUSHKAR
SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C., 20006

EMMET A. BLAES
JOCHEMS, SARGENT & BLAES
200 East First Street
Wichita, Kansas 67201

Attorneys for Petitioner, National Helium Corporation

Of Counsel:

WENDELL J. DOGGETT
General Counsel &
Secretary
National Helium
Corporation
P. O. Box 1642
Houston, Texas 77001

WILLIAM H. ALLEN
EUGENE D. GULLAND
COVINGTON & BURLING
888 Sixteenth Street, N. W.
Washington, D. C. 20006

JOSEPH W. KENNEDY
MORRIS, LAING, EVANS,
BROCK & KENNEDY,
CHARTERED
Suite 430
200 West Douglas
Wichita, Kansas 67202

Attorneys for
Petitioner, Phillips
Petroleum Company

Of Counsel:

R. PRICE HOWARD
Senior Counsel
Phillips Petroleum
Company
Bartlesville, Oklahoma
74003

ROBERT L. ACKERLY
RAYMOND S. E. PUSHKAR
SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C., 20006

WILLIAM S. RICHARDSON
ADAMS, JONES, ROBINSON AND
MALONE, CHARTERED
P. O. Box 1034
Wichita, Kansas 67201

DANIEL R. HOPKINS
P. O. Box 25128
Oklahoma City, Oklahoma
73125

Attorneys for
Petitioner, Cities Service
Helex, Inc.

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1120

NATIONAL HELIUM CORPORATION,
and
PHILLIPS PETROLEUM COMPANY,
and
CITIES SERVICE HELEX, INC.,
Petitioners,

v.

ROGERS C. B. MORTON, Secretary of Interior,
and
ELBURT F. OSBORN, Director, Bureau of Mines,
Department of Interior,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX TO APPENDIX

Page

OPINIONS BELOW:

National Helium Corp. v. *Morton*, 486 F.2d 995 (10th Cir. 1973) 1a

National Helium Corp. v. *Morton*, 361 F. Supp. 78 (D. Kan. 1973) 19a

National Helium Corp. v. *Morton*, 455 F.2d 650 (10th Cir. 1971) 73a

National Helium Corp. v. *Morton*, 326 F. Supp. 151 (D. Kan. 1971) 83a

Judgment, Tenth Circuit Court of Appeals, October 19, 1973 .....140a

Termination of Helium Purchase Contracts by the Secretary, Department of Interior, February 2, 1973 97a

STATUTES:

National Environmental Policy Act, 42 U.S.C. Sections 4321-4335 (1970) 120a

Helium Act, 50 U.S.C. Sections 167-167n (1970) 124a

Administrative Procedure Act, 5 U.S.C. Sections 701-706 (1970) 136a

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1973

NATIONAL HELIUM CORPORATION,
Plaintiff-Appellee,

and

PHILLIPS PETROLEUM COMPANY

and

CITIES SERVICE HELEX, INC.,
Intervenor-Plaintiff-Appellees,

v.

ROGERS C. B. MORTON, Secretary of the Interior, and ELBURT F. OSBORN, Director, Bureau of Mines, Department of the Interior,
Defendants-Appellants.

Nos. 73-1169
73-1449

Opinion

Before BREITENSTEIN, HILL and DOYLE, Circuit Judges.
DOYLE, Circuit Judge.

This cause has been appealed on prior occasions. In National Helium Corporation v. Morton, 455 F.2d 650 (10th Cir. 1971), the district court had ruled that helium purchase contracts entered into pursuant to the Helium Act, 50 U.S.C. § 167 et seq. could not be terminated by the Sec-

retary of the Interior without the filing by the Interior Department of an environmental impact statement in accordance with 42 U.S.C. § 4321 et seq. This court affirmed that decision, holding that the Department was required to comply with this provision of the National Environmental Policy Act (NEPA). Following the filing of an environmental impact statement by the Department, the Secretary again terminated the helium purchase contracts and once again plaintiffs-appellees filed an injunction suit in the United States District Court for the District of Kansas. The district court again enjoined the Secretary. On this occasion it was due to the dissatisfaction of the court with the impact statement. There have been two other appeal proceedings presented to us. One of these involved the scope of the retrial—whether it was to be an agency review or a *de novo* hearing. The other had to do with efforts of plaintiffs-appellees to discover government documents.

The district court filed the decision leading to the instant appeal on June 11, 1973. It again enjoined the Secretary of the Interior from terminating three of the helium purchase contracts. Although the Department had filed an impact statement the court ruled that it had failed to comply with the mandate of the National Environmental Policy Act of 1969; that the impact statement, if not deficient in scope, was essentially lacking in depth. At present, then, the primary issue before the court is whether the Department's impact statement or report was in accordance with the statutory standards and in accordance with this court's mandate in the prior case.

On the prior occasion and now the Secretary terminated the contracts pursuant to their express termination provisions. He did so on the basis that the helium program had been substantially carried out. The mentioned provisions authorize him to terminate when there has been a substantial diminution in helium requirements, discovery of

large new helium resources or other changes of a similar nature.[1]

At the time that these contracts were entered into, the U.S. helium requirements amounted to 530 million cubic feet of helium per year. This requirement increased in subsequent years, but commenced to decline in 1967 and has declined every year since so that in the year 1970 the demand had decreased to 400 million cubic feet. An average of 3.126 billion cubic feet of helium had been purchased each year. In the years 1971-72 the demand diminished in substantial amounts and all of the purchases have decreased, although they continue to be in excess of two billion cubic feet annually. During this entire purchase period the government through the Bureau of Mines had purchased enough helium to meet all of its needs and has not needed to use the purchased helium. Furthermore, the government believes that it has much more of a supply than can possibly be used between now and 2000. It is estimated that it is six times as much as will be needed.

---

[1] In our prior opinion, 455 F.2d at 653, we said:

> Under the Act the Secretary is not *required* to purchase any helium. The entire matter is left to his discretion. In deciding to terminate the contract the Secretary stated that the basic purposes of the Act had been fulfilled, that is that the 25-year purchase program envisioned by the Act was unnecessary because as of the time of termination his estimates showed that there was enough helium in storage to fulfill government requirements through 1995. The Secretary notified the companies on January 26, 1971, that the contracts would be terminated effective March 27, 1971. In his letter he stated that there had been a diminution in the requirements of helium for essential governmental activities, and that there had been new discoveries since the execution of the contract, which discoveries had provided large sources of available helium if more of the gas "is required for essential government activities than is now in storage or will be recovered in government plants."

Following this court's decision the Interior Department proceeded at once to conduct a study leading to the preparation and filing of an environmental impact statement. The initial draft was submitted to interested parties, including the plaintiffs, and comments were received. These are included as part of the report of the Department. The final environmental statement was issued November 13, 1972. The hearing in the district court consisted of a judicial review of the administrative record. It was not a trial *de novo*. (This was in accordance with the adjudication of this court after the mentioned interlocutory appeal.) The proceedings in the district court were extensive as to the composition of the administrative record. Plaintiffs had full opportunity to express their views, and the court's opinion was thorough and exhaustive.

In its final decision the court ruled that it was limited to determining whether the agency's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. It concluded that the Department's effort in preparing the impact statement was an insufficient one which failed to come up to the mentioned standard in numerous respects. It characterized the statement as "feeble," "obviously incomplete," "appallingly deficient," "startling in its brevity and lack of depth," and, finally, said that the statement totally failed to consider the environmental impact of termination. The court disapproved the statement in its entirety and remanded the cause for further proceedings.

Reversal is demanded on the following grounds:

First, it is contended that there was a lack of jurisdiction for the district court to even entertain the case in view of the Supreme Court's recent decision (rendered since our last decision) in United States v. Students Chal. Reg. Agcy. Pro. (SCRAP), —— U.S. ——, 93 S.Ct. 2405 (1973).

Second, the environmental statement was valid and sufficient; the district court erred in condemning it.

Third, the Secretary complied with the procedural requirements of NEPA as well as with this court's mandate. Hence, there was no justification for issuing the injunction.

Fourth, the district court erred in considering grounds other than sufficiency of F.E.S. since it lacked authority to enjoin for any ground except noncompliance with NEPA.

I.

Jurisdiction

A. Whether the Authority of the Secretary is Superseded by NEPA.

First we consider the renewed challenge to jurisdiction. As above noted, this question was determined adversely to the government in the early appeal. *See* 455 F.2d at 653-54. The government now urges that the Supreme Court's recent decision in United States v. Students Challenging Regulatory Agency Procedures, *supra*, has changed the applicable law and that this issue must be reexamined. In this recent case the Supreme Court reviewed the decision of the District of Columbia three-judge court which enjoined a proposed railroad rate increase of the Interstate Commerce Act. Under that Act a railroad is required to give at least 30 days notice for carrying out a proposed rate increase. During this period the Interstate Commerce Commission may, pursuant to § 15(7) of the Act, suspend the operation of the proposed rate for a maximum of seven months pending an investigation and decision of the lawfulness of the new rates. The Interstate Commerce Commission refused to suspend the rate increase and the environmental issue arose from the fact that the increase involved a 2.5 percent surcharge on nearly all freight rates. Plaintiffs alleged that the modified rate structure would discourage the transportation of recyclable material and promote the use of raw materials which compete with scrap material and would thereby affect the environment. The Court based its decision on Arrow Transportation Co. v.

Southern Railway Co., 372 U.S. 658 (1963), which had held that Congress had in the ICC Act vested *exclusive* power in the ICC to suspend rates pending final decision and had deliberately extinguished judicial power to grant this relief; the district court lacked jurisdiction to grant an injunction.

It seems apparent that the case at bar differs from the so-called SCRAP decision in that the Helium Act does not vest the Secretary with the same kind of regulatory authority as was present in the SCRAP case. The holding that NEPA did not subvert the power of the Interstate Commerce Commission was not surprising since the Commission is a tribunal in its own right with peculiarly exclusive authority within its sphere.

The SCRAP decision does create at least a shadow of doubt as to whether the Secretary's power was undermined by NEPA. The fact, however, that it gives pause is not enough because the differences between the two conditions are marked.

The district court held that additional bases of jurisdiction existed under 28 U.S.C. § 1331 (federal question), § 1361 (action to compel a federal officer to perform his duty), and §§ 2201 and 2202 (declaratory judgments). Jurisdiction on other than NEPA grounds becomes important only if we find compliance with NEPA. This argument is superfluous since NEPA furnishes a jurisdictional base, and the case being properly in federal court it is there for all purposes. Hence, we have no concern over jurisdiction outside the NEPA base.

B. Contract Termination—Use of Injunction

The trial court did not follow this court's mandate that the only issue giving the district court jurisdiction to entertain the injunction suit was the noncompliance with the requirement of an impact statement. We stated in our former opinion that the Secretary was not compelled to purchase any helium; that the matter was left to his dis-

cretion and he was within his rights in terminating the contracts. We adhere to these views.

We have fully considered the Supreme Court cases which prohibit injunctive relief against governmental officers on account of their upholding the rights of the government arising under a contract. Such a suit is distinguished by the Supreme Court from actions seeking compensations for an alleged wrong and are regarded as actions against the sovereign to which there has not been consent. *See* Larson v. Domestic & Foreign Commerce Corporation, 337 U.S. 682 (1949).[2]

It is fundamental that the Tucker Act which contains a limited consent of the United States to be sued does not authorize an action in injunction. *See* Richardson v. Morris, —— U.S. ——, 93 S.Ct. 629 (1973) and United States v. King, 395 U.S. 1 (1969).

We view the action seeking to require the Department to file an impact statement to stand on a different footing in

---

[2] In distinguishing between actions seeking damages and suits like the case at bar, the Supreme Court said:

> But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restraiin the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, "the interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. * * * "

337 U.S. at 704. *See also* some of the numerous other cases which support the *Larson* holding: Dugan v. Rank, 372 U.S. 609 (1963); Land v. Dollar, 330 U.S. 731 (1947); United States v. Sherwood, 312 U.S. 584 (1941).

relationship to the sovereign immunity doctrine and the cited cases because the action merely seeks [3] to obtain compliance with the National Environmental Policy Act of 1969 and is not for the purpose of asserting and enforcing a private right. Also, if the impact statement is to be meaningful the requirement must be virtually absolute. Thus, we conceive of the review of the Secretary's action as being strictly limited to compliance with the requirement of the environmental impact statement. This, of course, includes consideration given to the statement by the Secretary, for if he failed to consider it his action would assume arbitrariness and capriciousness.

Efforts to enjoin the Secretary from terminating the contracts for an indefinite period of time must, of course, fail. We reject the plaintiffs' argument that review of the termination is permissible under the Administrative Procedures Act. We fail to perceive any violation of the 1960 Helium Act Amendments.

II.

Next we consider whether the Secretary and the Department fulfilled the requirements of § 4332. A primary issue is the scope and the test of judicial review. First, what is the standard to be used in such review and, second, whether the court correctly assessed the agency's action in the light of the NEPA requirements.

A. The Standard To Be Applied.

The specific procedural requirements of NEPA are delineated in 42 U.S.C. § 4332. Section 4332(2)(A)-(H) imposes specific procedural duties on federal agencies, one of which is the duty of preparing a detailed impact statement to accompany any recommendation for a major federal action significantly affecting the environment. The require-

[3] Since the defendants are engaged in upholding a public right they can only be acting pursuant to public laws.

ments of this impact statement contained in § 4332(2)(C) include five specific areas to be covered in the impact statement:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposed be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of the man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The trial court employed the "arbitrary and capricious" standard of § 706 of the APA.[4] This sets aside the action if it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The trial court purportedly relied on the Supreme Court's decision in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971). This case did not, however, involve the preparation of an environmental impact statement. This was a review of the decision of the Secretary of Transportation in respect to the building of a highway through a park. This was in truth "agency action." The decision of the Secretary in *Overton Park* was concerned with the Department of Transportation Act of 1966 and the Federal-Aid Highway Act of 1968. In assessing the adequacy of the impact statement, we are not here reviewing, as we said above, agency action within the meaning of § 706 of the APA. Rather, we are concerned with the NEPA requirement which is, to be sure, a prerequisite for agency action but is not agency action itself. The trial court's conclu-

---

[4] National Helium Company, et al. v. Morton, No. W-4568, filed June 11, 1973 (D. Kansas), page 26.

sion that it was required by *Overton Park* to apply the arbitrary and capricious standard was, in our view, erroneous.

The better reasoned decisions have required an objective good faith effort to comply with the statutory procedural requirements. Other than that, the courts have demanded that the agency do more than mechanically pursue the procedural standards. Thus, in Calvert Cliffs' Coord. Com. v. United States A. E. Com'n, 449 F.2d 1109 (D.C. Cir. 1971), the court added to the good faith standard by saying that the agency must comply with the procedural requirements to the fullest extent possible. The same Circuit in Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972), has said that the procedural requirements are not intended to be a straitjacket or to demand what is, fairly speaking, not meaningfully possible.

Finally, the most recent decision of the D.C. Circuit, Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, D.C. Cir., No. 72-1331, June 12, 1973, expounds the standards more clearly than earlier decisions:

> It is apparent, however, that the Commission seeks to avoid issuing its forthcoming "environmental survey" as an impact statement under Section 102, not out of any desire to circumvent NEPA's procedural requirements, but rather because of a fear that Section 102's requirements as to the contents of an impact statement are so strict, particularly as to the need for "detail" in the statement, that any Commission attempt to issue its environmental survey as a NEPA statement would be doomed to failure. While we do not altogether understand the Commission's fears, we feel they are based on certain misapprehensions as to what NEPA requires.
>
> * * * *
>
> Accordingly, if the Commission's environmental survey is prepared and issued in accordance with NEPA procedures, and if the Commission makes a good faith effort in the survey to describe the reason-

> ably foreseeable environmental impact of the program, alternatives to the program and their reasonably foreseeable environmental impact, and the irreversible and irretrievable commitment of resources the program involves, we see no reason why the survey will not fully satisfy the requirements of Section 102(C).

The environmental impact statement should be placed in perspective. The relevant provisions bring environmental factors into the agency decision-making placing them on an equal footing with economic, technical and other considerations. Also, this environmental impact statement serves as source material for the head of the agency, the Congress, for the President and the public. See Calvert Cliffs' *supra*. If the agency had failed altogether to follow out the procedure required by NEPA, the arbitrary and capricious standard might well apply. That is not our present problem. The rule of reason is a more appropriate standard where the sufficiency of the statement is being tested.[5]

---

[5] The cases cited by the trial court as calling for a "careful review" of agency action in environmental cases do not support the trial court's use of the "arbitrary and capricious" standard in assessing the factual adequacy of an impact statement. *Calvert Cliffs'* did not involve the review of an impact statement. *Scenic Hudson* was concerned with the adequacy of an agency's decision, not the adequacy of the impact statement contributing to that decision. *N.R.D.C.* v. *Morton* dealt with the legal question of whether an agency's impact statement could exclude environmental alternatives merely because the agency had no specific authority to implement them. *E.D.F.* v. *Corps of Engineers* is somewhat confusing in its discussion of the standard of review. Careful examination of the case reveals, however, that the language about using the "arbitrary and capricious" test refers to review of agency decisions rather than the factual sufficiency of impact statements. The court actually adopted the "rule of reason" test which we have here approved when it assessed the factual sufficiency of the agency's compliance with § 102(2)(D) of NEPA. 470 F.2d at 297. A similar test would presumably be applied by that court in assessing the factual adequacy of other procedural requirements under § 102, including preparation of the impact statement.

In summary, then, our view is that the review of FES is limited to the following:

(1) Whether FES discusses all of the five procedural requirements of NEPA.

(2) Whether the environmental impact statement constitutes an objective good faith compliance with the demands of NEPA.

(3) Whether the statement contains a reasonable discussion of the subject matter involved in the five required areas.

III.

The remaining issue and the crucial one in the case pertains to the adequacy of the Final Environmental Statement testing it by the five prescribed areas set forth in § 4332(2)(C), *supra.*

As a preface, we note that there is some dispute as to whether the comments which were given by the various agencies and institutions to which the draft environmental statement were sent are to be regarded as a part of the Final Statement. The Department solicited, received and considered comments from many interested parties, including the plaintiff-appellees. They contend that the various comments are not to be considered as a part of the Final Statement. However, we disagree. These were incorporated into the Final Statement and were available for consideration by all interested parties and are available for the information of the President, the Congress and the public. Those commenting included the various agencies within the Interior Department and ten other federal agencies, including the National Science Foundation, Atomic Energy Commission, National Aeronautics and Space Administration and the Environmental Protection Agency. In addition, there were comments of three states, various scientific groups and a number of business and educational institutions. Moreover, the Final Environmental State-

ment shows that the comments were considered by the authors of the statement. The cases hold that the comments are to be regarded as an integral part of the statement. *See* Con. Council of N. Car. v. Froehlke, 340 F. Supp. 222 (M.D.N.C. 1972), and Environmental D. Fund, Inc. v. Corps. of Eng. of U.S. Army, 342 F. Supp. 1211, 1217 (E.D. Ark. W.D. 1972).

In general, the district court found fault with the fact that the impact statement did not deal adequately with economic feasibility. In our judgment, however, this subject was treated sufficiently insofar as it affected the environmental consequences which, after all, are the important factors to be considered. The role of the Final Environmental Statement is to enunciate the environmental considerations for the benefit of the decision-makers.

We are of the opinion that consideration of the five subjects prescribed by the statute was sufficient.

(i) *Environmental impact of the proposed action.*

There is no contention that the loss of helium, should it be lost, will affect the environment. It is, after all, a colorless, odorless, nonflammable, inert gas. Therefore, the matter to be weighed, and which the impact statement did weigh in accordance with our mandate in the previous case, is the secondary effect, namely, loss of the resource. As we have noted above, the supply which the government has in storage is sufficient to the year 2000 and perhaps beyond. Continued purchases by the government would at best extend the inventory for a period of from four to fourteen years. Thus, it would not solve the problem of the future use of it. The Final Environmental Statement considers the recovery of helium from the atmosphere. It considers the amount of electrical power which would be required and the effects of the generation of such power on air and thermal pollution. It notes that the extent of use of helium beyond the year 2000 is conjectural and speculative, and thus the

effect on the atmosphere of recovering the helium is itself conjectural. For our purpose the statement took into consideration all of the possibilities and it was not required to do more than this.

(ii) *Adverse environmental effects which are unavoidable.*

The statement points out the future problems of recapturing the lost helium if it is necessary.

(iii) *Alternatives to the proposed action*

The statement considers several alternatives, including reliance on the normal market process, expansion of the helium program by legislative action, use of leaner gases and recapture from the atmosphere. The discussion in our view satisfies the present requirement and the statement did not have to dwell on the imaginary horribles posed by the plaintiffs.[6]

(iv) *The relationship between local short-term uses of man's environment and the maintenance and enhancement of long term productivity.*

That which appears in parts i, ii, and iii above considers the present question. The statement took into account the known sources and supplies together with the possible uses such as generation and transmission of electrical power for nuclear reactors, for the space program, for levitation system of mass transportation and for cyrogenics.

We disagree with the trial court's finding that the impact statement's failure to consider the alternative of making the helium purchase program financially self-sustaining was a fatal defect. Such an alternative is somewhat obvious in that it would be a continuation of the present purchase program. This alternative is discussed in the statement.

---

[6] *Cf.* Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

The impact of this alternative is implicit in the discussion of the several alternatives contained in the Final Statement.

(v) *Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.*

The termination which is the proposed action is reversible by continuation of one or more of the contracts in modified form or by the negotiation of new contracts or by congressional action. Should the contracts be cancelled, and should the company shut down their separation plants, the helium which is now preserved would, of course, be lost. Beyond this, hard and fast predictions about the effect of termination of helium purchases on the technology which we would have in the Twenty-First Century would be nothing more than speculation. We consider the subject matter sufficiently discussed in the Final Statement. There is enough there to alert the decision-makers and others concerned.

Apart from the five categoris, § 4322(2)(C) requires that the Department "consult with and obtain the comments of" federal agencies having jurisdiction or special expertise with respect to any environmental impact involved in a contemplated action. The impact statement meets the standard prescribed by § 4322(2)(C) in this regard, when viewed in light of the "rule of reason" we have the approved. The requirement should not be viewed as necessitating that the completion of an impact statement be unreasonably or interminably delayed in order to include all potential comments or the results of works in progress which might shed some additional light on the subject of the impact statement. Such a result would often inordinately delay or prevent any decision in environmental cases. The courts should look for adequacy and completeness in an impact statement, not perfection. E.D.F. v. Corps of Engineers, 470 F.2d at 297. In this particular case this court expressed the opinion that an ultimate resolution of the issues involved in this case was urgent and should be expedited. 455 F.2d

657. The initial impact statement was not issued until May 16, 1972, and the Final Statement issued on November 13, 1972. To have delayed the statement any longer would have flown in the face of what we considered a reasonable time for preparation of the statement.

It is also contended by the parties (appellees) that the statement is defective because of failure to state the purpose of the contemplated action. Section 4332(2)(C) does not explicitly require that the purpose of the contemplated government action be spelled out. While in many types of governmental action the exact purpose of the action might be unclear and thus lead to confusion were it not stated, this is not such a case. The self-evident purpose of the proposed action here is to terminate the continued purchase of helium reserves which the Secretary regards as economically superfluous and beyond the goals set forth in the 1960 Amendments to the Helium Act.

We see no merit in the further argument of the appellees that the real reason for contract termination was to effect a financial saving and that the Office of Management and Budget dictated cancellation. The Secretary terminated the contracts and the Office of Management and Budget does not have authority to dictate to the Secretary the decision that he is to make in connection with a contract entered into and terminable by him.[7]

Applying the rule of reason which is enunciated in the cases, we conclude that the statement is fully acceptable. It adequately discusses future needs and future supplies. It weighs the costs now as opposed to the future. It is a comprehensive and thorough document. We disagree with the derogatory comments of the parties and the district court regarding it.

Much time and opportunity have been extended to the appellees. There has been much delay as a result and we

---

[7] Walter Holm & Company v. Hardin, 449 F.2d 1009, 1013 (D.C. Cir. 1971).

repeat what we have said in our prior decisions that inasmuch as the decision has been made the termination should be carried out without delay.

Accordingly, the judgment of the district court is reversed and the cause is remanded with directions to dismiss the action.

Nos. 73-1169 and 73-1449—National Helium Corporation v. Morton

BREITENSTEIN, Circuit Judge, concurring.

I concur in the result. It may be that my differences with the majority go to form rather than substance.

The decision in United States v. Students Challenging Regulatory Agency Procedures, —— U.S. ——, 41 LW 4866, SCRAP, does not affect federal jurisdiction in the instant case because we have no concern with any federal statute conferring exclusive jurisdiction on an agency. The argument of the Government is that this case involves federal contracts and that the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491, is the only statute which gives federal courts jurisdiction over government contract cases. In the first place, this suit does not arise out of any contract. It is concerned with compliance with the National Environmental Policy Act of 1969, NEPA, 42 U.S.C. § 4321 et seq. In the second place the Tucker Act does not equate with the statute giving the Interstate Commerce Commission exclusive power to suspend rates.

The general standard of judicial review of agency actions is found in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The action is set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-414. The key phrase in § 706 is "agency action." NEPA directs that "to the fullest extent possible * * * all agencies of the Federal Government shall * * * include in every * * * major Federal action(s) signi-

ficantly affecting the quality of the human environment a detailed statement by the responsible official" covering stated subject areas. NEPA alters the decision-making process of the federal agencies and brings environmental factors to an equal footing with economic, technical, and other traditional considerations, all of which must be balanced by the decision-maker.

The issue of scope of judicial review must be divided into two parts: first, the review of the Final Environmental Statement (FES), second, the review of the action of the Secretary terminating the contracts. See Wyoming Outdoor Coordinating Council v. Butz, 10 Cir., ——F.2d ——, slip opinion p. 12, n. 5. I believe that different standards apply to each part.

I reject, and I believe that the majority opinion rejects, the apparent holdings of the Eighth and Fourth Circuits that an environmental statement is judicially reviewable on its merits to determine sufficiency. See Environmental Defense Fund v. Corps of Engineers of the United States Army, 8 Cir., 470 F.2d 289, 298, and Conservation Council of North Carolina v. Froehlke, 4 Cir., 473 F.2d 664, 665. I believe that judicial review of an impact statement is limited to a determination of whether the statement is a good faith, objective, and reasonable presentation of the subject areas mandated by NEPA. The courts should not second-guess the scientists, experts, economists, and planners who make the environmental statement.

In my opinion FES is an excellent job which fully complies with both the letter and the spirit of NEPA. It is a comprehensive study which displays objectivity and good faith. Its discussion reasonably presents the environmental effects, the alternatives, the relationship between short-term and long-term uses of man's environment, and the possible economic effects.

This brings me to the second question, judicial review of the Secretary's action terminating the contracts. Here

the standard is that provided by the APA. The statement of the Secretary at termination of the contracts shows that in accordance with NEPA he carefully reviewed FES. His action was not a mechanical compliance with NEPA but rather a full consideration of FES with an understanding and reasonable application of its comprehensive study. He balanced the environmental factors with the other pertinent factors. His final action was neither arbitrary, capricious, nor an abuse of discretion. Accordingly, the district court's injunction was improper.

One other point should be mentioned. Neither the statements of the trial nor of this court determine the contractual rights of the parties, whatever they may be. Those are for consideration by the Court of Claims under the Tucker Act.

UNITED STATES DISTRICT COURT, D. KANSAS

June 11, 1973.

Civ. A. No. W-4568.

National Helium Corporation, *Plaintiff*,

Phillips Petroleum Company and Cities Service Helex, Inc., *Intervenors*,

v.

Rogers C. B. Morton, Secretary of the Interior, and Elburt F. Osborn, Director, Bureau of Mines, Department of the Interior, *Defendants*.

Decision and Opinion of the Court

Theis, District Judge.

On March 27, 1971, this Court temporarily enjoined the Secretary of the Interior from terminating the National Helium Conservation Program as implemented by three

helium procurement contracts entered into with the plaintiffs prior to a hearing on the merits or, alternatively, a reconsideration by the Department of Interior of its action in the light of the applicable substantive and procedural requirements of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321 et seq.; the Helium Act, as amended by the Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C. § 167 et seq.; and the Administrative Procedure Act, 5 U.S.C. § 551 et seq. National Helium Corporation v. Morton, 326 F.Supp. 151 (D.Kan. 1971), aff'd. 455 F.2d 650 (10th Cir. 1971). Of particular concern to the Court was the failure of the Department of Interior to prepare a final environmental impact statement prior to taking the contemplated action. On February 2, 1973, the Secretary of Interior again determined that the helium procurement contracts should be terminated, since the purposes of the Helium Act of 1960 had been satisfied and, accordingly, notices were sent to the plaintiffs that termination would occur on April 4, 1973, at 8:00 a.m., C.S.T. Having prepared a final environmental impact statement in accordance with § 4332(2)(C) of the National Environmental Policy Act, 42 U.S.C., the Secretary immediately moved for dissolution of the preliminary injunction.

In response to the defendants' notices of termination and motion for dissolution, the plaintiffs filed verified amended complaints seeking, *inter alia,* the continuation of the preliminary injunction pending a full hearing on the merits of the case. They alleged that: (1) the defendants had not complied with the procedural and substantive requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (hereinafter referred to as "NEPA"), the Helium Act Amendments of 1960, 50 U.S.C. § 167 et seq. (hereinafter referred to as the "Helium Act"); and the Administrative Procedure Act, 5 U.S.C. § 551 et seq., prior to the termination of the contracts; (2) the necessary conditions precedent for termination of the implementing contracts and the National Helium Conservation Program had not in

fact occurred; and (3) the proposed agency action was otherwise arbitrary, capricious, an abuse of discretion, and not in accordance with law. In support of their allegations, the plaintiffs submitted documents, briefs, and a number of affidavits.

On March 14, 1973, the Court heard oral argument on the defendants' motion to dissolve the preliminary injunction. The defendants contended that since a comprehensive final environmental impact statement had been prepared, upon which the Secretary of Interior had determined to terminate the helium contracts, the Secretary's decision was entitled to a presumption of regularity, and the preliminary injunction should accordingly be dissolved. After a careful examination of the defendants' draft and final environmental statements and the pertinent comments attached thereto, the plaintiffs' amended complaint and supporting affidavits and documents, and the applicable law, the Court overruled the defendants' motion.

The Court had already ruled that it had jurisdiction of the suit by virtue of 28 U.S.C. §§ 1331, 1361, 2201 and 2202, and 5 U.S.C. §§ 701-706; that the plaintiff had standing to raise the issues herein involved; that the termination of these contracts was a major federal action significantly affecting the quality of human environment and posing serious environmental consequences within the meaning of § 4332(2)(C) of NEPA, 42 U.S.C.; that the requirements of NEPA were applicable to the Department of Interior "to the fullest extent possible" in the administration of the Helium Act by virtue of 42 U.S.C. § 4332; that there had been a sufficient showing of a likelihood of irreparable injury to the plaintiffs and the public if the Secretary's action was not enjoined; and that the Secretary's decision was subject to limited judicial review pursuant to § 706(2)(A) of the Administrative Procedure Act, 5 U.S.C., National Helium Corporation v. Morton, supra. Although the Secretary's decision was entitled to a presumption of regularity, "that presumption [was] not to shield his action

from a thorough, probing, in-depth review." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971).

Since the plaintiffs' amended complaints and supporting documents presented a substantial controversy involving complex factual and legal issues justifying the maintenance of the status quo pending further hearings, and the Court was convinced that the plaintiffs had established a probability of ultimate success, thereby justifying the issuance of a preliminary injunction in the first instance in accordance with the standards enunciated in Crowther v. Seaborg, 415 F.2d 437 (10th Cir. 1969), the Court determined that the dissolution of the previous injunction would be a futile gesture. See Environmental Defense Fund v. Corps of Engineers of the United States Army, 325 F.Supp. 749 (E.D. Ark. 1971). The Court did, however, require the plaintiffs to post a bond in the sum of $2,000,000 for the payment of such costs and damages as might be incurred by defendants if they were found to have been wrongfully restrained, and determined that this bond, along with the twenty-eight million dollars owed by the Government to the contractors, gave it a thirty million dollar security cushion.

The defendants immediately perfected an appeal of this Court's order denying their motion for dissolution of the preliminary injunction to the Tenth Circuit Court of Appeals. In response to the defendants' request, this Court also certified its subsequent orders denying the defendants' motions for summary judgment on the pleadings pursuant to Rule 56, F.R.Civ.P. and, in the alternative, dismissal of the amended complaints, in part, for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), F.R.C.P. The Tenth Circuit did not rule on any of the orders, but it did direct that the trial on the merits should be held within thirty days on the administrative record, rather than by trial *de novo*, in conformity with the recent United States Supreme Court decision in Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). Having resolved the

preliminary matters, reviewed the administrative record as supplemented by the plaintiffs, and heard oral argument, this case is ripe for final disposition.

Factual Background

This is a case of considerable complexity and moment. A basic review of the characteristics of helium and the history and development of this country's helium conservation program, including the role played by the implementing helium procurement contracts herein involved, consequently serves as an instructive prelude to its resolution. The summary which follows was gleaned from the administrative record submitted by the Department of Interior, including numerous departmental studies, compilations, and reports, and is supported by the findings of facts in related litigation in Northern Natural Gas Company v. Grounds, 292 F.Supp. 619, 624-680 (D. Kan. 1968), aff'd. 441 F.2d 704 (10th Cir. 1971); Air Reduction v. Hickel, 137 U.S. App. D.C. 24, 420 F.2d 592 (1969); and Northern Helex Co. v. United States, 455 F.2d 546 (C.Cl. 1972).

Helium is a colorless, odorless, and tasteless gas which, in the present state of scientific knowledge, will not react chemically or physically with any other element, except under laboratory conditions. Helium is non-combustible. It is the second lightest element found on earth next to hydrogen, which is highly combustible. Helium does not liquefy at standard atmospheric pressure until is reaches —452.1 degrees Fahrenheit, almost absolute zero and lower than any other gas. It is the only known gas which can develop superconductivity in metals. It is the best known transmitter of sound and the best conductor of heat at near absolute zero of any gas. It becomes a super fluid near absolute zero. Helium is non-toxic to man and it does not become radioactive.

Since its discovery on the sun by Sir Norman Lockyear in 1868, helium has grown from a laboratory curiosity with

no practical applications to one of the most valuable, yet rapidly wasting, elements on earth. As measured by its demand, helium has established itself as a tool in shielded arc welding and other metallurgical applications, lighter-than-air applications, chromatography as a carrier gas, leak detection, heat transfer medium in nuclear power reactors, pressurizing and purging liquid propellants for space boosters, under sea work as a breathing gas when mixed with oxygen, medical research and therapeutic treatment, cryogenics, and in low temperature research. Helium is also presently being used as a coolant in high-temperature gas-cooled reactors.

Future uses of helium for which research is presently being carried on by the Government and private industry include its application in such areas as power generation by helium-cooled fission reactors, nuclear fusion reactors, superconducting systems of generation and transmission of power, magnetohydrodynamics, and transportation by superconducting magnetic levitation systems, to name a few. In the future, uses of helium are expected to develop which are now unforeseen or unknown.

Before 1960, with minor exceptions, the production and marketing of helium was accomplished by the Bureau of Mines, pursuant to the Helium Act of 1925, 50 U.S.C. § 161 et seq.:

> "An act authorizing the conservation, production, and exploitation of helium gas, a mineral resource pertaining to the national defense, and to the development of commercial aeronautics, and for other purposes." 43 Stat. 1110.

The Act authorized the Bureau of Mines to operate plants, to store and care for helium, and to conduct exploration. The Secretary of Interior was authorized to acquire land or interest in land by purchase, lease or condemnation where necessary, to provide helium to supply the needs of

the Army, Navy, and other branches of the Government. 50 U.S.C. § 161. Other than a minor amendment of the Act in 1927 in order to permit the limited leasing or selling of helium to aid scientific and commercial development, 44 Stat. 1387, the Act remained essentially the same until 1937. By amendment in 1937, Ch. 895, 50 Stat. 885, to the Helium Act of 1925, Ch. 426, 43 Stat. 1110, the Secretary was directed to purchase, if possible, all properties developed or constructed by private parties for helium production prior to the passage of the amendment.

Until the advent of World War II, the uses of helium outside the laboratory were in lighter-than-air-craft and, when mixed with oxygen, in medicine and deep-sea diving. Since the Government was the predominant consumer of helium, the emphasis of the helium program was accordingly upon meeting current and short-range helium needs. At the commencement of World War II, all helium extraction facilities were owned by the United States, and consisted solely of the Amarillo Plant, located at the Cliffside Field in Potter County, Texas, which had been purchased in 1933.

During World War II, the usefulness of helium was broadened considerably. Four plants were built to meet the greatly increased military need for helium, and during the 1950's demand for helium rose spectacularly due to the development of new uses, including atomic weapons, nuclear energy plants, military and civilian rocketry, exploration of outer space, cryogenics, and other uses connected with both science and industry. As increasing helium demands threatened to outstrip the production capacity of the Bureau of Mines, concern arose regarding the future ability to meet mobilization needs and the causal wastage of the natural resource. In 1957, the Director, Office of Defense Mobilization, recommended to the Secretary of Interior that a working group be established to determine the feasibility of making the conservation aspect of the

helium program the primary, rather than incidental, objective of the Department of Interior.

A working group was subsequently established, comprised of representatives from the Departments of Commerce, Defense and Interior, Atomic Energy Commission, Office of Defense Mobilization, Bureau of the Budget, and Federal Power Commission. Headed by then Undersecretary of Interior, O. Hatfield Chilson, now our esteemed colleague on the federal bench in the District of Colorado, the group compiled a study entitled "Cost and Implementation of a National Helium Conservation Policy." (The Chilson Report, January 24, 1958). As a result of the study, a national helium conservation policy was subsequently recommended to President Eisenhower and formally approved on April 25, 1958.

The Report noted that approximately 99% of the known helium-bearing natural gas resources in the United States was concentrated in four fields containing approximately 119 billion cubic feet of potentially recoverable helium: (1) the Hugoton Field of Texas, Oklahoma and Kansas; (2) the Panhandle Field of Texas; (3) the Keyes Field of Oklahoma; and (4) the Greenwood Field of Kansas. The Report further noted that these fields had been developed by private companies to supply natural gas to fuel markets, and that since the companies merely considered the helium to be a minor impurity no effort was being made to remove it; consequently, the helium was merely passing into the atmosphere without serving any useful purpose.

The study group recognized a number of significant factors suggesting the need for a long term helium conservation program. First, although the demand for helium had been consistently rising, the emphasis of the helium program was on meeting current, short term needs. Second, helium was essential to the country's missile and atomic energy programs, and an invaluable industrial tool. Third, the helium supply being conserved by the Bureau

of Mines, although sufficient to meet current foreseeable governmental needs, would likely not be sufficient to meet future governmental and private demands resulting from expected and unforeseeable developments in new and expanding technologies. Fourth, natural gas was the only known commercial source of helium, since recovery from the atmosphere and other sources was impracticable due to the economic and environmental barriers. Fifth, the world's largest helium-bearing gas fields were located in the United States, yet the helium was being allowed to vent into the air without serving any useful purpose and would probably be totally depleted by 1985. Sixth, due to the inability to place a "value" on helium as a result of the speculative nature of its future demand and the predominant government utilization, there was no economic incentive for private industry to extract and store the helium for future use. Seventh, if nothing was done, the nation's richest source of helium would be least available at a time when it was needed the most. Finally, that present legislation did not permit the implementation of a long-range conservation program as envisioned.

In order that an effective long-range helium conservation program might be implemented, the Report recommended that the Helium Act, 50 U.S.C. § 161 et seq., be amended in such a way so as to give the Secretary of Interior the authority to build up to thirteen new helium production plants to extract the helium prior to transmission of the natural gas to fuel markets, and to store the helium thus conserved in the government-owned Cliffside gas field or in some other suitable underground reservoir. In addition, the Report suggested that it might be feasible to augment this basic conservation plan by acquiring and shutting in relatively small isolated helium-bearing gas fields, although the acquisition of *all* of the fields was thought to be impracticable.

Since it was not certain that private companies would be willing or able to participate in the program, however,

and in light of the current and unforeseeable importance of helium to the national welfare, the Report suggested that the legislation be drafted in such a way so as to authorize the Secretary to condemn the helium-bearing natural gas after its removal from place of deposit in nature. Furthermore, although suggesting an end to the long-standing governmental monopoly on the *production* of helium, the Report recommended that the Secretary retain control over the *sale* and *use* of helium produced by private companies not participating in the program, and thus be able to control the price of the gas and determine its end uses.

Due to the magnitude of the expense involved in accomplishing the conservation program, the Report recommended that: (1) private industry be encouraged to participate in the program by entering long-term contracts with the Government which would give the companies a reasonable return on their capital investment and, at the same time, help to defray the overall costs of the program; (2) the Secretary be authorized to set the price for the helium at a level which would enable the Department of Interior to cover all costs incurred in carrying out the provisions of the program; (3) all federal agencies and contractors purchase all major requirements of helium from the Secretary; and (4) the private companies participating in the program be prohibited from selling any helium to any purchaser other than the Secretary at a price lower than the lowest price paid by any government agency.

In 1958 the Department of the Interior proposed legislation to Congress for the implementation of the recommended conservation program. This was not acted upon, however, and redrafted proposals were subsequently submitted to Congress on July 27, 1959. After lengthy hearings and incidental revisions and amendments of the proposed bill, a legislative amendment was adopted on Sep-

tember 13, 1960, to be known as "An Act to amend the Helium Act of March 3, 1925, as amended, for the defense, security, and the general welfare of the United States."[1] 50 U.S.C. § 167 et seq. The Act became effective on March 1, 1961, and a limitation on the annual contracting authority of 47.5 million dollars was established by the Act of August 3, 1961, 75 Stat. 246, 253.

The 1960 Helium Act Amendments authorized the Secretary of the Interior to enter into long-term contracts for the acquisition, processing, transportation, or conservation of helium, not exceeding twenty-five years. 50 U.S.C. § 167a(a)(2). In addition, he was given the power to acquire, by eminent domain, helium contained in helium-bearing natural gas and so much of such gas as was necessarily removed in the extraction process, if he were unable to acquire helium otherwise upon reasonable terms and at the fair market value. 50 U.S.C. § 167a(a)(2). In an attempt to make the program self-liquidating, the Act provided for a comprehensive system similar to that recommended by the Chilson Report. 50 U.S.C. §§ 167a(c), 167c, 167d and 167j. The Secretary was given authority to set his own price for the helium that he sold (50 U.S.C.

---

[1] Pub.L. 86-777, 74 Stat. 920. All proceedings were before the 86th Congress. The bill which became the Helium Act Amendments of 1960 was H.R. 10548. Other bills which were considered are S. 827, S. 2567, S. 3376, H.R. 8440, H.R. 8451 and H.R. 11030. The Reports of the hearings before the Committee on Interior and Insular Affairs, United States Senate, on H.R. 10548 and S. 3376, June 1 and 15, 1960, and the Report of Hearings Before the Subcommittee on Mines and Mining of the Committee on Interior and Insular Affairs, House of Representatives on H.R. 8440, H.R. 8451, H.R. 10548 and H.R. 11030, February 19, March 10 and 11, 1960, are printed. The Report of the House Committee is designated H.Rptr. No. 1552 and of the Senate, S.Rptr. No. 1814, U.S. Code Cong. & Admin.News 1960, p. 3595, with a minority report by Senator Carroll designated Part 2. Debate in the House and Senate is reported in 106 Cong.Rec., pp. 9089-9095, 15119-15125, 17855, 18936-18538, 18544-18546, 18602-18609 and 18902-18904.

§ 167d(c)), and to establish and promulgate such rules and regulations, consistent with the directions of the Act, which were necessary to carry out its provisions. 50 U.S.C. § 167g.

Pursuant to the authority given the Secretary by the Helium Act Amendments, the Secretary of Interior entered into helium procurement contracts with the plaintiff companies and with Northern Helex Company in August, October, and November, 1961. These companies were chosen due to the large amount of helium which they could assure, and their ability to accomplish the necessary production assemblage and perform the underlying contracts. The award of the contracts to these four companies obligated all of the available 47.5 million dollars contracting authority and thus completed that phase of the helium conservation program, unless and until the contracting authority was increased. That authority has not been increased by Congress.

Each contract provided for the sale and delivery to the United States of a helium-gas mixture for a term of twenty-two years. The companies were required to construct at their own risk and expense helium extraction plants and necessary facilities capable of processing at least 500 million cubic feet of Hugoton area gas per day (in the case of National Helium, approximately 840 million cubic feet of natural gas per day). The contracts followed a general pattern, although they varied in detail. Each contract contained an initial price per MCF of contained helium varying from $10.30 to $11.78. The prices were broken down into two parts, one related to the cost of gas and the other related to other costs. The companies have at all times fully met their obligations under the contracts.

Subsequent to the implementation of the expanded helium conservation program, numerous studies and reports concerning the program were prepared by federal agen-

cies and by interested private groups and, in accordance with § 167n of the Helium Act Amendments, the Secretary of Interior made annual reports to advise Congress of the current status of the government's helium program. Generally, these reports contained financial, statistical, and operating information concerning the program for each fiscal year that it was in operation.

The helium conservation program apparently ran smoothly until some time in 1968. After the passage of the 1960 Act, however, several private companies had begun their own helium extraction outside of the government program. Because the Secretary's price for helium reflected not only direct extraction costs, but also a portion of the costs involved in the administration of the conservation program, the Secretary's price for helium exceeded the private producers' price. As the private companies' sales increased, the Secretary's sales decreased, despite increased overall demand.

In response to this situation, the Secretary proposed regulations in 33 Fed. Reg. 5219-20 (1968), which were later revised and officially published on October 18, 1968, in 33 Fed. Reg. 15478-80, to become effective December 2, 1968. The regulations would have forbidden government agencies *and their contractors* from purchasing their major requirements of helium from any source other than the Secretary, or private companies "eligible" under the regulations.

In Air Reduction Company v. Hickel, supra, these regulations were stricken down. The Court held that, although Congress had intended that the Seceretary not lose his market because of private competition, it had not provided statutory authority to require government contractors to purchase their helium from the Secretary. The Court noted, however, that the Secretary's purpose could be accomplished by obtaining an Executive Order requiring that such provisions be included in all contracts en-

tered into by government agencies. Air Reduction Company v. Hickel, supra, 420 F.2d at p. 597. An Executive Order was never obtained.

It became increasingly evident that the costs of the program were not diminishing according to expectations and that the program was being adversely affected by the intrusion into what had been a virtually exclusive government market of private producers of helium. Moreover, the program was suffering financially from a temporary lull in sales occasioned principally by the large cuts in the space program. Consequently, the Department of Interior started negotiations with the four helium conservation contractors in an attempt to modify the contracts in a way that would reduce the costs of the program to the Government and still fulfill the goals of the program.

Due to diminished sales, however, the Department of Interior had fallen into arrears in making payments to the four helium contractors. Partial payments were made for a while, but payments ceased entirely in November, 1969, notwithstanding the continuance of deliveries. At the close of the calendar year of 1970, the Government owed large sums to the helium contractors for delivered helium. Consequently, on December 24, 1970, one of the helium contractors, Northern Helex Company, brought an action in the Court of Claims against the United States for breach of contract. In Northern Helex Company v. United States, 455 F.2d 546 (Ct.Cl.1972), the Court of Claims held that the Government was liable for anticipatory breach of the contract, but the issue of damages is still pending.

On January 26, 1971, and while negotiations were still in progress with at least one of the remaining contractors, the Department of Interior advised plaintiffs that, pursuant to paragraph 12.1 of the contracts, the contracts would be terminated effective sixty days thereafter. Al-

though specific language varied, each contract provided for termination as follows:

> "12.1 Buyer [Federal Government] may, at is option, terminate this contract at any time if, (1) in the opinion of the Secretary of the Interior, the discovery of large new helium resources or a substantial diminution in helium requirements or any circumstance of similar nature should occur which would make the continued operation of Seller's plant and the continued purchase of helium-gas mixture extracted therein unnecessary to accomplish the purposes of the Act or any amendment thereto, or (2) a material circumstance of force majeure making it impracticable or impossible for either Buyer or Seller to carry out its obligations under this contract which circumstance cannot be remedied with reasonable dispatch."

The President's Budget, issued on January 29, 1971, coincidentally, did not include a request for appropriations for continued funding of the contracts.

On March 17, 1971, the plaintiffs filed the instant action against the defendants, and on March 26, 1971, this Court issued a preliminary injunction enjoining the termination of the contracts. Following the decision of the Tenth Circuit Court of Appeals in National Helium Corporation v. Morton, 455 F.2d 650 (10th Cir. 1971), affirming this Court's holding, the decision to terminate the contracts was remanded to the Secretary for reconsideration in light of the requirements of the National Environmental Policy Act, 42 U.S.C. § 4331 et seq.

A draft environmental impact statement was subsequently prepared by the Department of Interior, and its availability was officially announced in the Federal Register on May 23, 1972. A final environmental impact statement entitled "Termination of Helium Purchase Contracts—United States Department of Interior—Bureau of Mines" was issued on November 13, 1972. On Febru-

ary 2, 1973, the Secretary of Interior gave notice of termination to the plaintiffs, to become effective sixty days thereafter. Accompanying the notices was a statement prepared by the Secretary justifying the termination of the helium conservation program in terms of the termination clauses of each of the helium purchase contracts.

The Secretary's termination statement, which is based on the Department's final environmental statement and the comments received from the private contractors, recognizes that: (1) the direct result of the decision to terminate the contracts will be that the Government will forego the storage of an estimated 20 billion cubic feet of helium which will be "wasted" or "depleted" if the contractors do not continue to extract and store the helium, prior to delivery of the natural gas to fuel markets; (2) natural gas—primarily fuel gas—is the only known source of helium other than the atmosphere, an environmentally and economically inferior source; (3) the currently proved "helium-rich" natural gas reserves (containing at least 0.3% helium) will probably be exhausted before the turn of the century; (4) it is unknown exactly how much, if any, "lean" helium-bearing natural gas will be available after the year 2000; (5) present studies predict large demands for helium for environmentally beneficial uses beginning around the turn of the century which *could* rapidly deplete the helium supply then in storage; (6) assuming a lack of supply at a later time, future environmentally beneficial technological advancements *might* be precluded due to unacceptably adverse environmental effects of recovery from other sources.

In contrast to the above possibilities, the Secretary's statement notes that: (1) government demand for helium has decreased consistently since 1966, and is presently below the 1961 level; (2) present technological advancement enables recovery of helium from "lean" sources of helium-bearing natural gas *expected* to be available in large quantities in the future; (3) the Bureau of Mines estimates

a total of 17 to 24 billion cubic feet of *probable* shut-in "helium-rich" reserves (i.e., found in natural gas fields not being exploited for present fuel purposes); (4) including the helium currently in storage, in shut-in government reserves, and expected to be recoverable from government-owned plants, total reserves approximate 44.5 billion cubic feet; (5) storage of recoverable helium at today's costs does not necessarily assure "low-cost" helium in the future; (6) the forecasted large demands for the future are "speculative" and of *questionable* reliability; (7) government agencies' estimates for future helium demands would not require removal of helium presently in storage "to meet essential government needs" until well into the next century; and (8) assuming the estimated total future demands were to materialize at the beginning of the next century, as predicted, the storage now of an additional 20 billion cubic feet of helium would merely delay, rather than foreclose, the necessity of obtaining helium from presently unknown or environmentally disadvantageous sources.

On the basis of the above *assumptions*, the Secretary determined that there had been a substantial diminution in helium requirements for essential government activities and that the termination was therefore authorized under Section 12.1 of the contracts, since the purposes of the Helium Act Amendments of 1969 had been satisfied, citing § 167m of the Act, 50 U.S.C.:

> "It is the sense of the Congress that it is in the national interest to foster and encourage individual enterprise in the development and distribution of supplies of helium, and at the same time provide, within economic limits, through the administration of this chapter, a sustained supply of helium which, together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Government activities."

In their amended complaints, the plaintiffs seek declaratory and injunctive relief setting aside the Secretary's decision to terminate the helium procurement contracts. In summary, the complaints allege that: (1) the Secretary's termination decision was not preceded by full compliance with the procedural and substantive requirements of the National Environmental Policy Act, 42 U.S.C. § 4331 et seq., and the Administrative Procedure Act, 5 U.S.C. § 701 et seq.; (2) the Secretary's termination decision was not warranted by the terms of the contracts, constituting the helium conservation program, and was accordingly inconsistent with the purpose of the Helium Act Amendments of 1960, 50 U.S.C. § 167 et seq.; and (3) the Secretary's termination decision was otherwise "arbitrary, capricious, an abuse of discretion, and not in accordance with law."

JURISDICTION

The plaintiffs' amended complaints not only challenge agency compliance with NEPA, but also seek review of agency action under the Helium Act Amendments of 1960, 50 U.S.C. § 167 et seq. The plaintiffs contend that the Secretary is, in effect, terminating the entire helium program authorized by Congress, and that this Court should review his action under the Administrative Procedure Act as authorized by Congress in 50 U.S.C. § 167h(a) in order to determine whether such action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The defendants concede this Court's jurisdiction to review procedural compliance with NEPA, but contend that the Court lacks jurisdiction to review the Secretary's decision on any other basis. The defendants assert three bases for this contention.

First, the defendants contend that, assuming full agency compliance with NEPA, all other claims sound solely in

contract; that since the amount in controversy exceeds the sum of $10,000, this Court lacks subject matter jurisdiction over such claims by virtue of 28 U.S.C. § 1346 (a)(2); that the proper forum for the relief sought by the plaintiffs is the Court of Claims in an action brought under the Tucker Act, 28 U.S.C. § 1491; and that neither this Court nor the Court of Claims is authorized to grant equitable or declaratory relief under such contracts, as dictated by United States v. King, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969), and Richardson v. Morris, 409 U.S. 464, 93 S.Ct. 629, 34 L.Ed.2d 647 (1973).

The Court does not quarrel with the basic proposition that it lacks jurisdiction to grant declaratory relief to private individuals or companies merely seeking to obtain specific performance of government contracts, but it categorically rejects such a characterization of this action. As is evident from only a cursory examination of the pleadings in this case, the plaintiffs are not suing for breach of government contracts and seeking damages or specific performance—they are requesting the Court to enjoin the improper termination of practically an entire helium conservation program created by Congress to prevent the unnecessary depletion of a vital natural resource.

Although the plaintiffs are admittedly motivated by private pecuniary considerations, which fact gives them standing to sue (Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2 184 (1970)), the plaintiffs are also seeking vindication of the public's interest in protection of a vital wasting natural resource and the propagation of an important Congressional program. Viewing the plaintiffs' cause of action in this perspective, the Court will not permit the Secretary to shield his actions from judicial scrutiny and relegate the "public interest" to an impotent Court of Claims remedy "merely because it sounds in contract." National Helium Corporation v. Morton, 455 F.2d 650, 654 (10th Cir. 1971).

Second, the defendants contend that this is not an action solely against a government official, but is rather a suit against the United States, since the relief sought would expend itself upon the public treasury and preclude authorized government action, and that it is accordingly barred by the doctrine of sovereign immunity in accordance with Wells v. Roper, 246 U.S. 335, 38 S.Ct. 317, 62 L.Ed. 755 (1918); Land v. Dollar, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); Larson v. Domestic & Foreign Commerce Corporation, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); and Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963). Although impliedly admitting that the Secretary's action in this case was "agency action" under the terms of the Administrative Procedure Act, 5 U.S.C. §§ 551(13) and 701(b)(2), the defendants assert that that Act does not act as a waiver of sovereign immunity.

It must be recognized at the outset that the plethora of cases dealing with the nebulous and sometimes oppressive concept of sovereign immunity cannot be completely reconciled. As Mr. Justice Stewart noted in Malone v. Bowdoin, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962):

> "While it is possible to differentiate many of these cases upon their individual facts, it is fair to say that to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task." 369 U.S. a 646, 82 S.Ct. at 983.

Since the Court is convinced that this action is clearly not barred by the doctrine of sovereign immunity, it will waive embarkment. See Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971).

The defendants are correct in their assertion that the Administrative Procedure Act does not act as a waiver of sovereign immunity, *in and of itself*. Motah v. United States, 402 F.2d 1 (10th Cir. 1968), *contra* Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App.D.C. 371, 424 F.2d

859, 874 (1970). Here, however, Congress itself implicitly waived sovereign immunity as a bar to review of "agency action" under the Helium Act Amendments of 1960. Section 167h specifically provides that:

> ". . . provisions of the Administrative Procedure Act of June 11, 1946, as amended, shall apply to *any agency proceeding and any agency action taken under this chapter* . . . and the terms 'agency proceeding' and 'agency action' shall have the meaning specified in the Administrative Procedure Act." (Emphasis added.)

It would indeed be anomalous for this Court to hold that sovereign immunity barred review of action specifically made subject to review by the sovereign, simply because such review might eventually expend itself upon the public treasury. Since the Secretary's action of terminating the helium procurement contracts was clearly "agency action," the doctrine of sovereign immunity is accordingly inapplicable.

Finally, the defendants contend that even if the doctrine of sovereign immunity is not applicable to the plaintiffs' non-NEPA claims, the Secretary's action of terminating the helium procurement contracts is not subject to review under the Administrative Procedure Act, since it is agency action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). There is simply no question but that the Secretary's action is action of an "authority of the Government of the United States," and that review is not prohibited by the Helium Act Amendments. 50 U.S.C. § 167h.

As noted by the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), the exception to the general rule that all agency actions are subject to judicial review, *unless* "committed to agency discretion by law," is a very narrow one. Referring to the legislative history of the Administrative Procedure Act, the Court noted that the exception

is applicable only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945):

> "The statutes of Congress are not merely advisory when they relate to administrative agencies any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." H.R.Rep.No. 1980, 79th Cong., 2d Sess., 41 (1945).

In determining whether in a particular case agency action is "committed to agency discretion by law," there is no presumption against review and in favor of administrative absolutism absent "a clear and convincing" showing of a contrary legislative intent or unless such purpose is fairly discernible in the statutory scheme. Abbott Laboratories v. Gardner, 387 U.S. 136, 141, 87 S.Ct. 1507, 1510-1511, 18 L.Ed.2d 681 (1967). The inquiry is not limited to merely whether the agency was given discretion to act, but also whether: (1) Congress intended that the exercise of that discretion be left *solely* to the expertise of the agency; and (2) the exercise of that discretion in a particular case involves the resolution of matters within the special administrative competence of the agency. Barlow v. Collins, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970). The Court cannot indulge in broad generalizations, but rather must review each individual agency action complained of in the light of the specific statutory scheme provided by Congress.

An examination of the legislative scheme provided by Congress in the Helium Act Amendments of 1960 reveals that the Secretary was given broad discretion in choosing an appropriate method of implementing a national helium conservation program. In the exercise of that discretion,

the Secretary chose to enter into long-term contracts with the plaintiffs, and within those contracts he provided a method by which they could be terminated in the event that further helium procurement was unnecessary to accomplish the purposes of the Act. On February 2, 1973, the Secretary again, exercised his discretion when he determined that the continuation of the contracts was unnecessary, *since the purposes of the Helium Act had been satisfied.* That determination was necessarily predicated on the Secretary's interpretation of the intended scope and purposes of the helium conservation program as envisioned by Congress in the promulgation of the Helium Act, and in particular Section 167m, 50 U.S.C.

Implicit in the Secretary's determination to terminate these contracts was the Secretary's realization that, although he was given wide discretion in choosing the means of implementing the Helium Act, his actions were to conform to the overall objectives of the Act; that he was not given unfettered discretion to, in effect, change the underlying purpose of the Act itself. The plaintiffs contend that the Secretary's determination that the objective of the Act was to conserve helium for foreseeable and "essential government activities" was clearly erroneous and constituted an abuse of discretion. They do not request the Court to substitute its judgment for that of the Secretary in areas clearly intended to be left solely to his special administrative expertise, but they do assert that the Court is obliged to review the Secretary's decision insofar as it involves an interpretation of the underlying statute. The Court agrees.

The principal dispute in this case, beyond the agency's compliance with NEPA, clearly involves the Secretary's interpretation of the provisions of the Helium Act. Section 4332(1) directs that "to the fullest extent possible . . . [the] public laws of the United States shall be interpreted and administered in accordance with the policies" therein set forth. If in determining to terminate the helium procurement contracts the Secretary interpreted the objec-

tives of the Helium Act in an erroneous or unnecessarily restrictive manner, his action would be contrary to not only the Helium Act, but NEPA as well; the statutes themselves clearly provide "law to apply." This statutory dispute must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction. Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970). As Justice Harlan so aptly noted in his dissent in Hardin v. Kentucky Utilities Co., 390 U.S. 1, 14, 88 S.Ct. 651, 658-659, 19 L.Ed.2d 787 (1968):

> "The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise . . . 'where the only or principal dispute relates to the meaning of the statutory term' . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert."

In light of the nature of the specific agency action involved in this suit and the clear congressional intention to permit review of agency action taken pursuant to the Helium Act Amendment of 1960 (50 U.S.C. § 167h(a)), this Court will not preclude review merely because the statute is written in broad and permissive language, although such fact necessarily limits the *scope* of the review. See Zuber v. Allen, 396 U.S. 168, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969), and Mulloy v. United States, 398 U.S. 410, 90 S.Ct. 1766, 26 L.Ed.2d 362 (1970).

Although it is unnecessary to reach the Secretary's ultimate decision in this case, since compliance with NEPA is a necessary prerequisite to taking any major federal action and the Court is convinced that the Secretary did not comply with the procedural or substantive requirements of NEPA, the Court would advise the Secretary to carefully review the Helium Act *as a whole*, and especially in the light of its legislative history.

The Court has reviewed that history, and it has been unable to find any mention of limiting the scope of the program to satisfying only "essential government activities." On the contrary, the Chilson Report (which was the technical foundation underlying the legislative amendment), the remarks of Mr. Bennett [2] (Undersecretary of Interior who was the major agency representative encouraging passage of the Act), the repeated statements of Senator Allott [3] (the major sponsor of the Bill in the Senate), and the statements of those appearing before the Insular Committee, all repeatedly refer to the need to conserve the helium from being wasted "without serving any useful purpose." They all reflect deep concern that helium is wasting that might be needed at some future time for unforeseen needs of the entire nation. In the words of Senator Allott:

> "The measure now awaiting final action by this body is, as we all must know by now, for the purpose of taking care of the reserves of helium for future use, both civilian and defense requirements. Although it is estimated that present reserves are adequate to meet forecast requirements for some time, these reserves are being depleted. . . . Mr. President, if we do not act promptly to halt this negligent, careless waste, we shall have little helium left for the future when, perhaps, we shall need it most." 106 Cong. Rec. 17855 (Aug. 26, 1960).

In reviewing the Helium Act itself, the only mention of any possible limitation on the conservation program which could even remotely be considered as limiting the purpose to conserving helium only for "essential government activities" is found in Section 15, 50 U.S.C. § 167m. The Court

---

[2] See, Hearings on H.R. 8440, 8451, 10548, 11030 before the U.S. Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess. (1960).

[3] See, 106 Cong. Rec. 17855, 18544-45, 18546, 18602 (1960).

has reviewed that section in light of the overall purpose of the statute, and it would encourage the Secretary to do the same. It *appears* to the Court that the section was intended to insure that the federal government would not interfere with private production, development, and sale of helium *unless* such activity interfered with the Government's need to make its own program self-liquidating or to provide for "essential government activities," and that it was not intended as a limitation on the conservation program itself.

Scope and Standards for Review

Having resolved these preliminary jurisdictional issues, the Court will now turn to the resolution of the plaintiffs' claims. As previously noted, the Court views the Secretary's compliance or non-compliance with NEPA to be the central issue of this case at this time. The plaintiffs assert that the procedural and substantive requirements of NEPA were not satisfied, and that the Secretary's termination of the helium procurement contracts must be enjoined and the matter remanded to the Department of Interior. The general rules regarding the scope and standards for review of agency action pursuant to the Administrative Procedure Act were only recently set out in detail by the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, supra. In reviewing agency action, the Court is initially confronted with three questions: (1) what is the standard for review; (2) what is the scope of review; and (3) upon what evidentiary basis is the action to be judged.

First, the standard for review to be applied in this case is readily apparent. Section 706 of the Administrative Procedure Act, 5 U.S.C., provides that in *all* cases a reviewing court must set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or which fails to meet statutory, procedural, or constitutional requirements. 5 U.S.C. § 706(2)(A), (B), (C), (D). Since the Secretary's action in this

case was not taken pursuant to a rule-making provision of the Administrative Procedure Act or based on a public adjudicatory hearing, neither the "substantial evidence" nor *de novo* review standards are applicable.

Second, the scope of review of agency action under the Administrative Procedure Act was clearly expressed by the Supreme Court in Citizens to Preserve Overton Park v. Volpe, supra, wherein the Court noted:

> "Even though there is no *de novo* review . . . the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity, . . . but that presumption is not to shield his action from a thorough, probing, in-depth review." 91 S.Ct. at 823-824.

Although this Court does not have the authority to substitute its judgment for that of the Secretary in areas of administrative expertise, it clearly does have the authority and obligation to engage in a careful scrutiny of the agency's action to determine whether such action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This careful review is especially appropriate in a case such as this involving alleged noncompliance with the procedural and substantive requirements of NEPA. See Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971); Scenic Hudson Preservation Conference v. Federal Power Commission, 453 F.2d 463 (2d Cir. 1971), cert. denied 407 U.S. 926, 92 S.Ct. 2453, 32 L.Ed.2d 813 (1972); Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972); and Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

Finally, a more difficult problem arises when determining upon what evidentiary basis an agency's action is to be judged in reviewing its propriety. Section 706 of the

Administrative Procedure Act provides that "in making the . . . determinations, the court shall review the *whole record.*" The defendants have persistently maintained that the administrative record in this case consists solely of: (1) the information relied upon by the Secretary in reaching his decision; (2) the comments received from agencies and interested parties responding to the draft environmental impact statement; and (3) the information brought to the attention of the agencies by the plaintiffs. The Court categorically rejects that position.

The National Environmental Policy Act places a positive duty on federal agencies to prepare a comprehensive environmental impact statement prior to taking any major federal action (§ 4332). Prior to the preparation of the statement, the Act directs that the agency *shall* "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to *any* environmental impact involved," and "initiate and utilize ecological information in the planning and development of resource-oriented projects" (§ 4332(C) and (G)). In this case the plaintiffs have proffered numerous documents and reports which were either prepared by the Department of Interior itself or other federal agencies, or readily available to any member of the public bearing directly upon the environmental impact of the Secretary's action. The defendants' pat response is that the documents were not brought to their attention by the plaintiffs prior to the preparation of the final environmental statement or the Secretary's decision so they are not relevant. The fallacy inherent in this reasoning is that it assumes that it is the burden of others outside the agency to bring pertinent material to the attention of the agency—*it is not.* The duty to unearth and utilize all relevant and available information lies directly and unequivocally with the agency.

In reviewing agency compliance with NEPA, the Court is obliged to consider *all* relevant material bearing directly or indirectly on the environmental aspects of the action under

consideration which were either (1) in the agency's files, but not disclosed in the final environmental statement; or (2) readily available to the agency had it fulfilled its statutory responsibilities. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, supra, 449 F.2d at p. 1119.

After having reviewed the administrative record submitted to the Court by the Department of Interior, and as supplemented by the plaintiffs, the Court is convinced that the Secretary's attempted compliance with NEPA, which is a necessary condition precedent to any major federal action, falls woefully short of the Act's requirements in a number of significant respects, primarily, the shortcomings of the Department's final environmental impact statement. Consequently, the Court does not reach the plaintiffs' remaining claims, but rather, remands this matter to the Department of Interior for further consideration in light of this opinion.

NEPA

In response to growing national concern about the state of the environment, Congress passed the National Environmental Policy Act (NEPA) in 1969. In so acting, Congress specifically recognized the need for a national policy which would encourage the productive and enjoyable harmony of man with his environment (§ 4321). Although the Act does not create any substantive rights to a clean and productive environment or establish environmental protection as the *exclusive* goal of federal agencies, it does assure that environmental amenities are carefully considered along with other considerations so that a proper balance is ultimately reached. Section 101, 42 U.S.C. § 4331, requires the federal government to use "all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources." Furthermore, in order to assure that the national policy is implemented and that all

federal agencies plan and work toward meeting the challenge of a better environment, Congress specifically included certain "action-forcing" provisions. See S.Rep. No. 91-296, 91st Cong., 1st Sess. 9 (1969).

Section 102, 42 U.S.C. § 4332 provides, among other things, that each federal agency shall, "to the fullest extent possible," included in every recommendation or report on major federal actions a "detailed statement" on:

"(C)

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

In addition, the section requires that "official shall consult with and obtain the comments of any Federal agency which has . . . special expertise with respect to the environmental impact involved," prior to the preparation of the statement (§ 4332(2)(C)); that the agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources" (§ 4332 (D)); and that the agency "initiate and utilize ecological information in the planning and development of resource-oriented projects (§ 4332(G)).

In furtherance of this congressional purpose, the Council on Environmental Quality has issued comprehensive guidelines for federal agencies to follow in conforming to the

mandates of NEPA (36 Fed.Reg. 7724, 7727 (1971), Executive Orders have been issued directing federal agencies to develop procedures for implementing and enforcing the Act (Executive Order 11514, 35 Fed.Reg. 4247 (1970)), and the Department of Interior has itself issued guidelines to be followed within its department in conforming with NEPA (36 Fed.Reg. 19,343-19,347 (1971)).

Based upon the clear language of NEPA, its implementing provisions, its legislative history, the many cases interpreting its import, and the underlying policy which it was intended to foster, it is clear that the mere formal filing of a document, in and of itself, does not satisfy the Act's substantive and procedural mandates or preclude further inquiry by judicial review. As noted in the recent Tenth Circuit Court of Appeals decision in Davis v. Morton, 469 F.2d 593 (1972):

> "Reading the Act and its legislative history together, there is little doubt that Congress intended all agencies under their authority to follow the *substantive and procedural mandates of NEPA.*" 469 F.2d at 596. (Emphasis added.)

Compliance with NEPA is more than a mere ritual—it requires thorough research, investigation, corroboration, and consideration of the environmental effects attending a given agency action.

In determining whether an agency has complied with NEPA prior to taking major federal action, the focal point of attention is the impact statement. As noted by Judge Leventhal in Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972), at page 833:

> "Congress contemplated that the Impact Statement would constitute the environmental source material for the information of the Congress as well as the Executive, in connection with the making of relevant deci-

> sions, and would be available to enhance enlightenment of—and by—the public. The impact statement provides a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action."

Assuming that the agency has fulfilled its responsibilities by consulting with other agencies and utilizing available ecological and technical information, the statement should constitute a full-bodied record upon which Congress, the Executive, the public and the agency can adequately judge the wisdom of the proposed action. Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, supra (purpose of statement is to aid agency in its decision and to fully inform other interested agencies and the public of environmental consequences); Environmental Defense Fund v. Corps of Engineers, 325 F.Supp. 749 (E.D. Ark. 1971) (statement must alert President, Council on Environmental Quality, the public, and Congress to all known or possible environmental consequences); Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971) (genuine, rather than perfunctory compliance with NEPA requires agency to explicate fully its course of inquiry, its analysis, and its reasoning); Greene County v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972) (statement must present a single coherent and comprehensive environmental analysis).

Before turning to the final environmental impact statement compiled by the Department of Interior in this case, it is first instructive to note that this is not the run-of-the-mill NEPA case. Normally, a federal agency is proposing to take affirmative action—such as the building of a dam, nuclear power facility, or pipeline—which is likely to have certain adverse environmental effects, yet which will also benefit society in some appreciable manner. The courts are consequently involved in the acrimonious imbroglio of

assuring that the agency has adequately weighed the possible adverse environmental effects against the likely beneficial goals of the action, and that a thorough cost-benefit analysis has, in fact, preceded the action.

In this case, however, the Department of Interior is not proposing to take any affirmative action—rather, the Department is recommending the abandonment of a comprehensive conservation program authorized by Congress to save a vital natural resource which was being needlessly frittered away without first serving any useful purpose. It is clear beyond peradventure that the recommended action will not benefit society, except perhaps economically, and then only temporarily. The question is—will it injure society?

The Department of Interior has consistently maintained from the beginning of this litigation nearly two years ago that the Secretary's action does not constitute major federal action—that it merely involves the termination of three contracts. An examination of the final environmental impact statement prepared by the Department of Interior in this case demonstrates that the Department of Interior continues to harbor that crabbed conception of this action.

The Impact Statement

On November 13, 1972, the Department of Interior issued a document entitled "Final Environmental Statement—Termination of Helium Purchase Contracts—United States Department of Interior—Bureau of Mines." The statement is comprised of eighty pages, excluding the comments received from other federal agencies and interested parties. It contains: (1) a general description of the proposed action (4 pages); (2) a general description of the environment (43 pages) including: the characteristics of helium (1 page); its current (9 pages) and prospective future uses (11 pages); its current proved, provable, possible, and speculative supply (11 pages); and its present and future

demand to the year 2000 (9 pages); (3) a discussion of the environmental impact of the proposed action (11 pages); (4) a one-paragraph discussion of the possible unavoidable adverse environmental effects; (5) a two-paragraph discussion of the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; (6) a one-paragraph discussion of the irreversible and irretrievable commitment of resources involved in the termination; (7) a discussion of the alternatives to the proposed action (6 paragraphs); and (8) a description of the consultation which preceded the issuance of the statement, and a reply to the comments received.

The Department's final impact statement is far from a coherent and comprehensive environmental analysis. It consists primarily of a narrative description of helium's characteristics and present and future uses, supply, and demand. After reviewing it, however, certain basic facts are evident: (1) these contracts involve the largest *known* source of helium-rich natural gas in the world, and if the helium is not extracted and stored it will be irretrievably lost; (2) present uses of helium indicate it is a most important or even indispensable element in our existing science, industry and ecology; (3) helium holds considerable promise as a necessary tool in the development of many environmentally beneficial technological advancements in such areas as exploration and future development of the sea, underground transmission of large blocks of electrical energy, virtually pollution-free generation of energy, and efficient high speed ground mass-transportation systems; (4) of the proven sources of helium-rich natural gas, most will probably be totally depleted some time between 1985-2000; (5) if the expected technological breakthroughs, many of which are now in the experimental stage, come to pass, helium will either have to be recovered from low content helium-bearing natural gas or the atmosphere; and (6) if these contracts are terminated, the future availability of

helium will be totally dependent upon the actions of the private companies.

After reviewing this portion of the statement, a number of questions beg answering: What is to be gained by terminating the contracts? Assuming that we will eventually have to rely on low content helium-bearing natural gas, how much is expected to be available at the turn of the century? Will recovery of helium from the atmosphere be economically feasible, and if so, will there be any adverse environmental effects? What effect will a future shortage of helium have on the ability to go forward with research in the areas holding considerable environmental promise? If these technological advancements are precluded due to a lack of helium and we are forced to rely upon more conventional systems, what will be the environmental effects? If the program is working as envisioned by Congress and is, or could be, self-liquidating, why terminate it? Would it be economically feasible to expand the program? Is there any economic incentive for the private companies to extract and store the helium? These and other questions go completely unanswered in the impact statement.

The entire discussion of the environmental impact of the proposed action can be quickly summarized as follows: (1) the Government will forego the purchase and storage of approximately 20 bcf of a non-renewable resource; (2) whether this helium is extracted and stored is completely up to the companies; (3) there will be no immediate direct environmental effects to either continuation or termination of the contracts, besides a possibility of some unemployment within the contractors' corporate structures; (4) in the event that large demands should materialize due to the development of new technological advancements, the storage now of 20 bcf of helium would only extend, rather than foreclose, the necessity of turning to other sources of helium; (5) alternatives include variations of the recommended action or further expansion of the conservation program; and (6) although further expansion of the pro-

gram could provide for additional helium and extend the period when helium will have to be obtained from unknown or environmentally disadvantageous sources legislation does not presently allow for expansion so it is not a pertinent alternative.

In examining the final environmental impact statement to determine whether it complied with the substantive and procedural requirements of NEPA, it was unnecessary for the Court to substitute its judgment for that of the Secretary in matters within his special expertise. The statement is appallingly deficient in a number of respects *on its face.*

A. Description of the Action

One of the most important aspects of any final environmental impact statement is the clarity with which it sets forth the exact purpose of the proposed action—why the action is being recommended and what is to be gained from it. Once the purpose of the action is clearly in focus the decision-maker, Congress, the Executive, and the public are in a position to balance the possible adverse environmental effects against the benefits to be gained from the action and reach a balanced and knowledgeable decision on its merits.

In its final environmental impact statement, the Department of Interior states that the purpose of the action is the termination of three helium procurement contracts. Since it is clear that the termination will likely result in the wastage of approximately 20 bcf of a non-renewable natural resource, is the reader to conclude that the purpose of the action is to commit the helium to waste for no apparent reason? Regardless of Interior's interpretation of the Helium Act as not *requiring* the purchase and storage of this helium, there is no doubt but that it clearly has the *authority* to so act. What then is the purpose of the action?

Although it cannot be gleaned from the statement itself, a perusal of the administrative record shows that the primary reasons for the action are: (1) the fact that the program is not as financially sound as it was expected to be; and (2) the desire to save approximately forty million dollars annually for helium purchases during the life of the helium procurement contracts. If one or both of these reasons motivated the recommended action, then the final environmental statement should so state. Otherwise, there is no method by which to balance the interests and determine the proper course of action.

In addition, the statement not only fails to set forth the purpose for the action, but it also blatantly misdescribes the actual effect of the proposed action. The decision to terminate these contracts represents more than merely a decision to forego the purchase and storage of 20 bcf of helium. It means the effective withdrawal from the farsighted federal commitment to helium conservation made by Congress over a decade ago. It represents a return to the same situation that prevailed before the contracts were entered into—the needless and useless wastage of a vital natural resource before it serves *any* useful purpose—and a decision to essentially turn our backs on the future generations of Americans who are likely to be acutely confronted with a bankruptcy of resources.

B. Short-Term Uses of Man's Environment

Section 4332(2)(C)(iv) of NEPA requires that each environmental impact statement set forth "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. . . ." The Council on Environmental Quality's Guidelines provide that "this in essence requires the agency to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations."

In a feeble attempt to comply with this requirement the Department's statement merely notes that it will forego the purchase and storage of 20 bcf of helium, and that the extent to which this helium could thereafter be recovered is conjectural. Although the statement recognizes the possibility that future demand may outrun then available supplies, it merely notes that the storage of an additional 20 bcf of helium now would only extend the period when it would have to be obtained from unknown sources by 4-15 years. The Department's conclusion—since present storage will not prevent recourse to other sources forever, there is no need to consider conservation—is a non sequitur.

From the information contained in the comments received by the Department of Interior and the administrative record, there is little doubt but that large supplies of helium will be needed in order to assure the eventual realization of many environmentally beneficial technological breakthroughs expected to blossom around the turn of the century. The statement totally fails to consider the possible effects of termination on the ability to go forward with research, development, and the eventual application of these techniques. As noted in the Court's previous orders, some of the more important areas include electrical power generation by helium-cooled fission reactors, nuclear fusion reactors, superconducting systems of generation and transmission of power, magnetohydrodynamics, and transportation by superconducting magnetic levitation systems.

Although the statement makes no attempt to quantify the importance of 20 bcf of helium in these areas, the comments do. The Atomic Energy Commission opined that 20 bcf of helium would be sufficient to supply the necessary inventory for all of the nation's high-temperature gas-cooled reactors built through the year 2010. Union Carbide expressed the opinion that 20 bcf of helium would only supply one-third of the needed inventory for these reactors. Clyde E. Taylor, of the Lawrence Radiation Laboratory,

estimated that 20 bcf of helium would provide the inventory for all of the nuclear fusion reactors built within the next fifty years. It is unknown how much helium will be needed in the other areas previously mentioned. Apparently, the Department did not feel it was important enough to look into.

In his recent message on the energy crisis, President Nixon stated that "if present trends continue unchecked, we could face a genuine energy crisis." But he added:

> "The crisis can and should be averted, for we have the capacity and the resources to meet our energy needs if only we take the proper steps—and take them now."

There is no question but that new technological breakthroughs in techniques involving the use of large amounts of helium hold the promise of solving at least some of our future energy needs. In his message, the President recommended the development of a "more comprehensive, integrated national energy policy to meet the emerging energy challenge." He noted that he had proposed a 35% increase in the funding of the nation's nuclear fusion research and development effort to accelerate experimental programs and to initiate preliminary reactor design studies, including the development of MHD. There is no doubt that the energy research effort stands high on the nation's list of priorities. In fact, the country is spending over fifty million dollars annually for research in cryogenics and superconductivity. Any action now to terminate these contracts must, therefore, thoroughly consider the possible effects which might ultimately ensue. The statement totally fails in that regard.

C. Possible Adverse Environmental Effects

Due to the failure of the statement to adequately consider the possible effect of the termination of the contracts on the future development and application of the techno-

logical advancements mentioned above, the statement is obviously incomplete in this regard. Section 4332(2)(C) requires that each statement include a discussion of the environmental impact of the proposed action. The specific treatment given to this subject in the final statement is startling in its brevity and lack of depth. In one paragraph, the statement points out that termination of these contracts would have no direct effect on the physical environment; that the Government would merely forego the purchase and storage of an additional 20 b[illegible] of helium; and that some unemployment might result. The section concludes with the statement that if it should become necessary or desirable to extract helium from the atmosphere:

> "It has been estimated that the power requirements to produce one billion cubic feet would be 26,000 megawatts. The generation of this amount of power using coal for fuel would add about 670,000 pounds per hour of pollutants to the atmosphere and increase thermal pollution by 3.5 times 10^2 Btu per day."

This scientific description of the effects of obtaining helium from the atmosphere was translated into understandable terms by the comments of Union Carbide Corporation. The 26,000 megawatts of power required to produce one billion cubic feet of helium is about one-tenth of the present United States power capacity. To obtain from the atmosphere the 20.7 billion cubic feet of helium which is proposed to be abandoned would require the equivalent of two years of the United States' total power output with the consequent inevitable air and thermal pollution:

> "To illustrate the impact upon thermal pollution, applying [the] logic of supplying 3.8 billion cubic feet of helium in the year 2000, if the total heat produced from all of the required helium-from-air plants were cooled by the water from the Mississippi River, the river temperature would be raised approximately 10

degrees Fahrenheit. If, as another example, the heat were discharged to the air in atmospheric (wet type) cooling towers, over 40 million barrels of water would be evaporated each day. This is about 125% of New York City's average daily water consumption of 30 million barrels." (Contractors joint response to DES pp. 13-14.)

Although the Court cannot understand why the Department's final statement did not phrase the discussion of the environmental effects of obtaining helium from the atmosphere in more commonly understood terms, it does alert the reader to the problem.

The Court's major complaint regarding the Department's discussion of possible adverse environmental effects of the proposed action is, as previously alluded to, the failure to discuss *any* secondary and indirect environmental effects likely to arise in the future. The Council on Environmental Quality's Guidelines specifically state that "both primary and secondary significant consequences for the environment should be included in the analysis." 36 Fed. Reg. 7725 (April 23, 1971). It further provides that:

> "The Act (NEPA) also indicates that adverse significant effects include those that degrade the quality of the environment, *curtail the range of beneficial uses of the environment, and serve short-term, to the disadvantage of long-term, environmental goals.* . . . Significant adverse effects on the quality of the human environment include both those that directly affect human beings and those that indirectly affect human beings through adverse effects on the environment." (Emphasis added.)

In analyzing the statement's discussion of adverse environmental effects, two questions immediately come to

mind: (1) what effect will the possible inability to go forward with research and development in the areas previously specified, due to the lack of an adequate supply of helium, have upon the future standard of living for Americans and the beneficial range of choices at the turn of the century; and (2) what will be the environmental effects of the necessity to utilize more conventional means of producing and transmitting energy and transporting large numbers of citizens to and from our cities? Although the statement does not even attempt to answer either question, the latter is somewhat answered by the comments to the statement.

Union Carbide estimated that 3,000,000 mw of nuclear powered electric generators would have to be build between 1980 and 2010. Assuming that helium was not available to supply (i.e., cool) these reactors, it noted:

> "The environmental impact of being forced to choose a less desirable reactor because of inability to obtain the required helium supply would be very large indeed. One thousand 1,200 mw electric stations using pressurized or boiling water reactors instead would increase waste heat rejection by 1,000,000 mw. This much waste heat is sufficient to heat the Niagara River enough to cook any fish or other living creatures and make Lake Ontario a dead sea. If this amount of waste heat were rejected in conventional cooling towers, it would vaporize over a million tons of water per hour, or the equivalent of one hundred acre ponds ten feet deep every day."

The response of the Pacific Gas and Electric Company concurred with Union Carbide's conclusion, noting that if it should later become necessary to rely upon steam-cooled reactors it could have a "staggering environmental impact." The statement does not even mention these possible adverse environmental effects. What additional ad-

verse environmental effects are likely to result from the present termination of these contracts is not discussed. The Court is aware of the speculative nature of these future projections, but the future supply of helium is likewise speculative. Complete analysis demands further attention to this area.

D. Irreversible and Irretrievable Commitments

Section 4332(2)(C) of NEPA requires that each statement contain a discussion of "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." In discussing this aspect of the environmental impacts of the proposed action, the Department of Interior merely notes that if the helium is not extracted from the natural gas streams, it will escape to the atmosphere. It then states that:

> "Upon termination of the helium purchase contracts, the extent to which each of the companies would continue to recover helium from the natural gas available to it and the extent to which it would store such helium . . . would rest entirely with each of the companies."

NEPA requires that federal agencies "use all practical means, consistent with other essential considerations of national policy, to improve and coordinate federal plans, functions, programs and *resources*, to the end that the nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(5) achieve a balance between population and *resource* use which will permit high standards of living and a wide sharing of life's amenities; and

(b) enhance the quality of renewable resources and approach the *maximum attainable recycling of depletable resources.*" § 4331(b). (Emphasis added.)

In addition to these requirements of NEPA, the Helium Act clearly places the responsibility for assuring that the helium conservation program is carried out in conformity with the Congressional objective squarely on the shoulders of the Secretary of Interior.

The Department of Interior cannot meet these responsibilities by merely recognizing that the future availability of helium will rest upon the companies' decisions. The impact statement should thoroughly examine what is likely to happen in the event that the contracts are terminated. Ever since the inception of the helium conservation program in 1960, the Government has operated on the assumption that current demands for helium, when coupled with the speculative nature of future helium demands, made it highly improbable that private companies would bear the economic burden of storing the helium for future use. If this situation still prevails, and in light of the diminished current demand for helium it would appear that it does, then the statement should so admit. In that event, the inadequacies of the discussion of irreversible and irretrievable commitments of resources are self-evident. If, on the other hand, it is certain that the companies will continue to extract the helium, then such a discussion would be unwarranted. In either event, the statement should reveal the facts as they are so that the reader is not left hopelessly in the dark.

E. Alternatives to the Recommended Action

Section 4332(2)(D) of NEPA requires each federal agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." In addition, Section

4332(2)(C)(iii) provides that the statement shall include a discussion of "alternatives to the proposed action." As noted by the Second Circuit Court of Appeals in Monroe County Conservation Council Inc. v. Volpe, 472 F.2d 693, 697-698 (2d Cir. 1972):

> "The requirement for a thorough study and a detailed description of alternatives, which was given further Congressional emphasis in § 4332(2)(D), is the linchpin of the entire impact statement."

Besides a short discussion of the alternatives available to the private companies if the contracts are terminated, the final environmental impact statement lists the following alternatives: (1) variations in the proposed action, such as termination of one or two of the contracts which would only vary the action in degree; (2) continuation of the contracts coupled with extension of their terms and an expansion of the amount to be purchased, which would extend the period when helium would have to be recovered from other sources by 7-24 years; and (3) various alternative methods of obtaining additional helium from other sources. Insofar as the latter two alternatives are concerned, the statement notes that the Department presently lacks statutory authority to implement them.

Assuming the exact nature of and reasons for the proposed action had previously been stated, and the possible environmental effects of the action had been thoroughly explored, the discussion of alternatives to termination could rationally be judged. As previously noted, however, the statement at no time tells the reader why the contracts are being terminated. If future needs and future supplies of helium gas are speculative, as all parties admit, then an examination of the statement itself would lead the reader to believe that the reason was either: (1) to casually waste a vital natural resource for the monetary savings; or (2) to terminate the contracts because

the amount of helium being conserved would only extend the time when helium would have to either be ignored as a natural resource or obtained from less environmentally advantageous sources, rather than preclude such occurrence. Obviously, this action is not motivated by either of these reasons, but what is the reason? The Department's discussion of alternatives epitomizes its attitude in this entire matter.

Decisions of this magnitude simply cannot be made in conference rooms behind closed doors. NEPA requires full disclosure of the exact nature of and reasons for a given action. It is only in this manner that an action can be judged on its merits and a reasoned choice between alternatives can be reached. When Congress passed the Helium Act in 1960, it provided a method by which the helium conservation program could be made self-liquidating—a method by which helium could be preserved for future generations at little or no cost to this generation. They realized that the loss of a natural resource before it served any useful purpose, in and of itself, constituted a needless and unwarranted environmental impact.

There is no question but that the termination of these contracts involves "unresolved conflicts concerning alternative uses of available resources." It is also clear from an examination of the administrative record in this case that the reason for the termination of the helium procurement contracts is the failure of the conservation program to become fiscally self-sufficient. The obvious alternative to cancelling these contracts is to make the program self-sustaining, yet the impact statement does not even consider this aspect. The Court finds this omission fatal.

The many documents and reports found in the administrative record and the comments received in response to the issuance of the draft environmental statement list a number of financial and legislative alternatives which could make the program financially sound. They include:

(1) negotiation with the contractors in an attempt to obtain a lower purchase price (a tentative agreement with National Helium Corporation would have reduced the Government's cost for helium-gas mixture by nearly 40%); (2) requiring all government contractors to purchase their helium requirements from the Department by Executive Order, as suggested in Air Reduction Company v. Hickel, 137 U.S.App.D.C. 24, 420 F.2d 592 (1969); (3) varying the sale price of the helium (Congress had originally recommended that the helium be sold for $40-$45, while the Department is presently selling it for $35); (4) placing a federal tax on the sale of helium not produced by the Government; (5) giving foreign governments a preferential right to purchase some of the helium and store it in the Cliffside facility; (6) lowering or eliminating the interest charge on borrowed money now used to operate the program; (7) treating the helium stored in Cliffside as a stockpile (materials and supplies now stockpiled such as copper, zinc, cobalt, and manganese, do not have interest added to current market price when sold, as helium does); and (8) prepayment to the Government by public utility companies ordering nuclear power stations, i.e., high temperature helium gas-cooled reactors (HTGR) for a future supply of stored helium to insure operation during the life of the reactor (see Appendix to Response of Union Carbide Corporation to Environmental Statement). Are any of these alternatives feasible? Would they individually or in combination assure a self-liquidating program or even an expanded conservation program which would take care of the needs of future generations? The statement's discussion does not even mention these alternatives, let alone analyze them in relation to the overall goals of the conservation program, but merely leaves the matter to the imagination of the reader.

In addition to the failure of the statement to discuss alternatives to the termination of the contracts which could make the present program self-sustaining—alterna-

tives recommended by many of the officials within the Department of Interior itself—the statement is wholly lacking in a meaningful discussion of alternatives which could at least minimize, if not avoid, the future necessity of, either going without helium, and consequently the technological advancements expected to be derived from its availability, or obtaining it from sources posing serious environmental effects. Although the statement lists the possibility of expanding the program in order to obtain additional sources of helium, it at no time analyzes the feasibility of such expansion or the overall minimization of possible adverse environmental effects attending such expansion.

The Council on Environmental Quality's Guidelines provides that in any action involving unresolved conflicts concerning alternative uses of available resources the statement must engage in a rigorous evaluation of alternatives:

> "A rigorous exploration and objective evaluation of alternative actions that might avoid *some or all* of the adverse environmental effects is essential. *Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects.*" (36 Fed.Reg. 7725 (April 23, 1971) (Emphasis added.))

There is absolutely no question but that the proposed action of the Department of Interior poses serious possible adverse environmental effects, despite the failures of the statement to elucidate them, and that the future availability of helium poses unresolved conflicts. If the continuation of these contracts alone will only *extend* the period within which helium might be scarce, then a full discussion of alternative methods of minimizing the eventual scarcity is demanded. The statement's discussion of these

alternatives is simply too vague, general, and conclusionary. See Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972), and Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827, 834 (1972).

The Court is aware of the defendants' contention that a vigorous analysis of alternatives requiring changes in legislation is normally not required of agencies. If this case merely involved the termination of three contracts the Court would fully agree with the contention that a rigorous examination of alternatives beyond the Department's legislative authority would be unnecessary. The Court *does not* agree. As has been previously noted, the Court views the Department's proposed action in this case as, *in effect*, a decision that a comprehensive program authorized by Congress is either unworkable, unwarranted, or unnecessary. It is more than a decision to terminate these three contracts, it is a decision to totally abandon a farsighted concept of present conservation for future utilization, and it could very well have the effect of precluding future expansion of the program.

As Senator Jackson noted prior to the passage of NEPA:

> "The needs and aspirations of future generations make it our duty to build a sound and operable foundation of national objectives for the management of our resources for our children and their children. The future of succeeding generations in this country is in our hands. It will be shaped by the choices we make. *We will not, and they cannot escape the consequences of our choices.*" 115 Cong. Rec. S. 71451 (Dec. 20, 1969) (Emphasis added.)

If we are to make the necessary choices today, we must first be fully aware of the available range of alternatives.

The Congressional decision to implement the conservation program was preceded by a thorough analysis and consideration of the broad, long-range effects attending the present wastage of helium and the available alternatives. A decision to terminate the program now must likewise be preceded by such an analysis—it simply has not been.

F. Procedure

There are a number of unresolved conflicts involved in the Department's proposed termination of the helium procurement contracts. Some of the more outstanding ones are: (1) Will there be any appreciable natural gas available at the turn of the century to serve as a source for future helium demands? (2) What effect will a future helium shortage have on this country's growing inability to meet its energy needs? (3) What effect will the possible inadequacy of helium at the turn of the century have on the ability to go forward with the development of such promising technological advancements as nuclear fusion, undersea exploration and development, outerspace exploration, and mass transportation? (4) What effect will a helium shortage have on the development of similar technologies in other countries of the world that are not blessed with such plentiful supplies of helium as this country? Although NEPA does not require "crystal ball" accuracy or the discussion of remote or speculative possibilities, it does require the agencies to take a "hard look" at the possible environmental impact of a given action and discuss reasonably foreseeable effects with a thoroughness commensurate with their severity and the significance of the action. The Court is convinced that the Department's attempted compliance with NEPA in this case falls far short of these responsibilities.

Section 4332(2)(C) of NEPA requires that before making the required detailed statement on environmental impact, the federal officials responsible for the statement

"shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." The extent of consultation by the Department of Interior in this case is indicated at the end of the text of the statement. The Department merely sent copies of the draft environmental statement to the federal agencies and invited, within a forty-five day time structure, comments and estimates of future helium requirements. Although several agencies expressed the desirability of more time and further consultation, there apparently was none.

In 1970, Congress passed the National Materials Policy Act of 1970, 84 Stat. 1234, 42 U.S.C. § 3251 et seq. Section 202 of that statute states that it is the purpose of the Act:

> "To enhance environmental quality and conserve materials by developing a national materials policy to utilize present resources and technology more efficiently, to anticipate the future materials, requirements of the Nation and the world, and to make recommendations on the supply, use, recovery, and disposal of materials."

In furtherance of this policy, the Act created a National Commission on Materials Policy to look into the nation's and the world's resources (including energy), make long-range predictions as to their availabilities, and provide recommendations in such broad areas as maximization of resource use; conservation and environmental protection; preferred technologies and research priorities; waste management and recycling; the use of incentive, penalties, and other control techniques; public education and the reshaping of values. On June 30, 1973, the Commission is due to submit their report to the White House and Congress. Although the work of the Commission is obviously related to the proposed termination, and despite the suggestion of the Environmental Protection Agency that the

Secretary confer with it, the Department did not even send them a copy of the draft statement.

Section 4332(2)(G) of NEPA, requires that agencies "initiate and utilize ecological information in the planning and development of resource-oriented projects." The National Science Foundation advised the Department of Interior that it was considering funding a "detailed study of helium needs and reserves through our Research Applied to National Needs Program." Such a study is, in fact, in progress at this time. The Department was urged to participate in the study, but it declined, due to the pending litigation.

In response to the plaintiffs' contention that the Department's failure to either consult with or actively participate in these comprehensive studies constitutes a clear violation of the requirements of NEPA, the defendants reply that either: (1) they were not brought to their attention by the plaintiffs, an observation of dubious validity; or (2) the Department's participation in such studies might have jeopardized their status in pending litigation. A response to this reasoning is unnecessary.

PUBLIC HEARINGS

Due to the failure of the Department of Interior to comply with either the procedural or substantive requirements of NEPA, the Court is remanding this matter to the Department for further consideration in light of this opinion. The plaintiffs have asserted that upon remand the Department should be ordered to hold public hearings, due to the large numer of unresolved conflicts inherent in the proposed action. The great majority of the scientists, industry officials, and Congressmen responding to the Department's final environmental impact statement also requested public hearings. The response of the Department of Interior to such requests was:

> "It is felt that the material accumulated in the draft environmental impact statement and the responses

thereto is more than adequate for the purposes of preparing a final environmental statement and of informing the public, and that hearings would not develop new material of a substantive nature which would materially aid in meeting these objectives. Therefore, public hearings were not scheduled."

As noted by the Tenth Circuit Court of Appeals in affirming this Court's order granting a preliminary hearing in this case. "neither the APA nor the NEPA compels [the Secretary] to appoint an examiner and conduct hearings." National Helium Corporation v. Morton, 455 F.2d 650, 657 (10th Cir. 1971). The Council on Environmental Quality's Guidelines (36 Fed. Reg. 7724-7725), the Executive Order implementing NEPA (Executive Order 11514, 35 Fed. Reg. 4247), and the Department's own guidelines (36 Fed. Reg. 18343, 19346, October 2, 1971), do, however, provide that public hearings shall be held "whenever appropriate." It is clear, therefore, that the Department's failure to hold public hearings was not contrary to law. The question is—was it an abuse of discretion? See Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1285-1286 (9th Cir. 1973).

In light of the large number of unresolved issues extant in this case, the deep public concern expressed by those responding to the Department's draft statement, the need for public enlightenment in areas involving the future availability of natural resources such as this, and the overriding national policy issue involved in this proposed action, the Court is convinced that the Department's failure to hold public hearings did constitute an abuse of discretion. The Court simply cannot envision a more "appropriate" case. Although the Court does not agree with the plaintiffs' contention that such hearings must necessarily be adversary in nature, the Court does believe that some type of formal hearings would materially advance the public interest and improve the overall quality of the Department's statement. The resulting final en-

vironmental statement would then serve as an instructive base for national action, administrative or legislative, or both.

ORDER

This Court has already ruled that the proposed action of the Department of Interior threatens irreparable injury to the plaintiffs and the public interest. A preliminary injunction is now in effect. For the reasons herein stated, the Court finds that the Secretary of Interior has not complied with either the procedural or substantive requirements of NEPA. Since compliance with NEPA is a necessary condition precedent to taking any major federal action, the Court does not reach the propriety of the Secretary's actual decision to terminate these contracts. To reiterate, the purpose for requiring strict compliance with NEPA is to assure that the decision-maker does, in fact, take a "hard look" at possible environmental impacts of a given action, balance those impacts against the benefits to be derived from the action, and reach an ultimate decision which gives fair consideration to environmental amenities. Due to the many inadequacies of the final environmental impact statement prepared by the Department of Interior, and before the Secretary when he made his final decision, such balancing process simply could not have occurred. Assuming that the Secretary had been fully apprised of the environmental impacts involved in the termination of these contracts, his decision might have been different. This matter must, therefore, be remanded to the Department of Interior for further consideration in light of this opinion.

It is therefore order that the preliminary injunction issued by this Court on March 27, 1971, enjoining the defendants, their agents and employees, from taking any action leading to the final termination of the National Helium Program and the implementing Contracts No. 14-09-0060-2429, No. 14-09-0060-2434, and No. 14-09-0060-

2424, be, and the same hereby is, continued in full force and effect pending further order of this Court.

It is further ordered that the bond previously set as payment of such costs and damages as may be incurred by defendants if they are found to have been wrongfully restrained, shall continue in full force and effect pending further order of this Court.

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

No. 71-1369

NATIONAL HELIUM CORPORATION, *Plaintiff-Appellee,*

v.

ROGERS C. B. MORTON, Secretary of the Interior, and ELBURT F. OSBORN, Director, Bureau of Mines, Department of the Interior, *Defendants-Appellants,*

CITIES SERVICE HELEX, INC. and PHILLIPS PETROLEUM COMPANY, *Intervenors-Appellees.*

OCTOBER 4, 1971

Before BREITENSTEIN, HILL and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge

The Secretary of the Interior in this case has appealed the decision of the United States District Court for the District of Kansas, 326 F.Supp. 151, in which an injunction was entered prohibiting the termination by the Secretary of a contract for the purchase of helium from appellee companies. It presents jurisdictional and procedural problems, but the decisive question is primarily one of substance. It is whether the Secretary could summarily terminate the purchase contract without carrying out the requirements of the National Environmental

Policy Act,[1] which section provides that federal agencies shall, in connection with major actions affecting the quality of the human environment, consider and make a statement as to the environmental impact of the proposed act and other environmental consequences. The District Court in granting the injunction held that it had jurisdiction and that the statement of the Secretary in terminating the contract contained no reference to consideration by the Secretary of the application of the NEPA. The court also held that the NEPA applies to the Helium Act and that, absent the injunction, helium would be lost in the atmosphere.

I

Under the terms of the Helium Act[2] the Secretary of the Interior is authorized to enter contracts of no more than 25 years' duration for the "acquisition, processing, transportation, or conservation of helium."[3] The objects of this Act as shown by §167m are first, to develop a helium producing industry in the private sector and, secondly, to assure a steady supply of helium for "essential Government activities."[4] The meaning of "essential Government activities" as shown by the legislative history of the Act is the needs principally of the Atomic Energy

---

[1] 42 U.S.C. § 4321 et seq. (hereinafter referred to as the NEPA).

[2] 50 U.S.C. § 167 et seq., as amended in 1960.

[3] 50 U.S.C. § 167a(a)(2).

[4] This section so provides:

> It is the sense of the Congress that it is in the national interest to foster and encourage individual enterprise in the development and distribution of supplies of helium, and at the same time provide, within economic limits, through the administration of this chapter, a sustained supply of helium which, together with supplies available or expected to become available otherwise, will be sufficeint to provide for essential Government activities. 50 U.S.C. § 167m.

Commission, the Department of Defense and the National Aeronautics and Space Administration.[5] The sponsors of the Act predicted that 70 percent of all helium produced would be used by government agencies and another 20 percent by government contractors, whereas only 10 percent would be used by private industry.[6]

Under the Act the Secretary is not *required* to purchase any helium. The entire matter is left to his discretion.[7] In deciding to terminate the contract[8] the Secretary stated that the basic purposes of the Act had been fulfilled, that is that the 25-year purchase program envisoned by the Act was unnecessary because as of the time of termination his estimates showed that there was enough helium in storage to fulfill government requirements through 1995. The Secretary notified the companies on January 26, 1971, that the contracts would be terminated effective March 27, 1971. In his letter he stated that there had been a diminution in the requirements of helium for essential governmental activities, and that there had been new discoveries since the execution of the contract, which dis-

---

[5] 106 Cong. Rec. 18544 (1960) (remarks of Senator Allott).

[6] *Id.* at 18544, 19546 (remarks of Senator Allott).

[7] *Id.* at 18545, 18608 (remarks of Senators Allott and Carroll).

[8] The termination clause under which the Secretary acted reads as follows:

> Buyer may, at its option, terminate this contract at any time if, (1) in the opinion of the Secretary of the Interior, the discovery of large new helium resources or a substantial diminution in helium requirements or any circumstance of similar nature should occur which would make the continued operation of Seller's plant and the continued purchase of helium-gas mixture extracted therein unnecessary to accomplish the purposes of the Act or any amendment thereto, or (2) a material circumstance of force majeure making it impracticable or impossible for either Buyer or Seller to carry out its obligations under this contract which circumstance cannot be remedied with reasonable dispatch.

coveries had provided large sources of available helium if more of the gas "is required for essential government activities than is now in storage or will be recovered in government plants."

In its complaint the plaintiff, National Helium Corporation, joined by intervenors, Cities Services Helex, Inc. and Phillips Petroleum Company, has alleged that the Secretary's action was procedurally defective because he failed to hold public hearings in accordance with the Helium Act and the Administrative Procedure Act, and in that he had failed to consult the Council on Environmental Quality. The prayer of each contractor was for preliminary injunction preventing termination of the contract. In anticipation of the Secretary's raising jurisdictional questions as to standing, the companies alleged that they were seeking to protect not only their own financial interests, but were also appearing as private attorneys general in order to protect the public interest in the helium program. In this latter connection they have alleged that if the helium is not extracted by them from the natural gas before the natural gas is delivered to the consumer, the helium would be vented into the atmosphere and lost when the natural gas was consumed as fuel.

In our judgment the District Court had jurisdiction to entertain the suit and did act properly in issuing injunctive relief in view of the Secretary's failure to observe the requirements of the NEPA prior to termination. Apart from this one aspect, we view the termination as action which is entirely within the discretion of the Secretary, involving as it does a contract which was entered into in the first instance solely on the basis of the Secretary's decision.

II

The government's claim is that the District Court lacked jurisdiction to review the action of the Secretary because

the subject matter involved a government contract in which the amount in controversy exceeds $10,000, and that the sole remedy available is an action in the Court of Claims under the Tucker Act, 28 U.S.C. § 1346. The government further maintains that the plaintiffs lack standing because they do not qualify as private attorneys general purporting to act in the public interest since the magnitude of their own private interests are manifestly opposed to the interests of the public.

The District Court thought that it was "passing strange" to see the giants of the oil and gas industry representing the public interest, but concluded that they were not per se disqualified to occupy this role and concluded that §10 of the Administrative Procedure Act gives standing to government contractors seeking review of administrative action challenged as arbitrary and capricious, abusive of discretion, or otherwise illegal.

We are of the opinion that the contention that this was not an agency action within the meaning of § 702 of the Administrative Procedure Act is untenable since the termination is not merely a contract termination but the termination of an extensive program authorized by act of Congress. The Administrative Procedure Act defines agency action as "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[9] We must therefore hold that the termination of a program as extensive as this which also poses substantial environmental problems qualifies under the mentioned definition. It cannot be denied that the companies have a genuine substantial financial interest in the termination of the contract. But it is their asserted representation of the public interest—which from their personal standpoint is admittedly less important than their private financial stake—which in final analysis justifies their seeking ju-

[9] 5 U.S.C. § 551.

dicial review. It is the Secretary's violation of or failure to comply with the mandate of the Environmental Protection Act which furnishes a jurisdictional basis.[10] If the contracting parties were not invoking NEPA, the problem of federal question jurisdiction would be perhaps somewhat tenuous.[11] Their remedy under the Tucker Act in the Court of Claims could arguably at least be adequate. At the same time, this Court of Claims remedy is not preemptive merely because it sounds in contract.

III

The Secretary next argues that he is protected from suit here by the doctrine of sovereign immunity because (1) the United States is the real litigant; (2) there is no statute authorizing injunctive interference with the termination of a government contract; and (3) the Administrative Procedure Act does not remove the bar to suits of this nature. However, as previously noted, we are of the view that the conservation and environmental issue makes the difference. It serves to distinguish this case from Wells v. Roper, 246 U.S. 335, 38 S.Ct. 317, 62 L.Ed. 755 (1918) and Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). The fact that the Secretary was compelled by law to act in accordance with the NEPA and failed to do so brings this case within the exception noted in Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), i.e. it is action which is contrary to law; and *cf.* Pankey Land & Cattle Company v. Hardin, 427 F.2d 43 (10th Cir. 1970), which involved the mere exercise of discretion by the Secretary of Agriculture. As we heretofore have

---

[10] We deem it unnecessary to denominate the contractors as private attorneys general.

[11] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

noted, the Administrative Procedure Act authorizes review of agency action in cases such as this one.[12]

It would be repetitious to discuss at length the further argument of the Secretary that the plaintiffs lack standing. We are unable to say that the companies are motivated solely by protection of their own pecuniary interest and that the public interest aspect is so infinitesimal that it ought to be disregarded altogether. It is not part of our function to weigh or proportion these conflicting interests. Nor are we called upon to determine whether persons seeking to advance the public interest are indeed conscientious and sincere in their efforts. True, the plaintiffs are not primarily devoted to ecological improvement, but they are not on this account disqualified from seeking to advance such an interest. No group has a monopoly on working for the public good. *Cf.* Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), cert. denied 400 U.S. 949, 91 S.Ct. 237, 27 L.Ed.2d 256 (1970). Neither this cited case nor Environmental Defense Fund, Inc. v. Hardin, 138 U.S. App. D.C. 391, 428 F.2d 1093 so requires. These cases did observe that the litigants there involved were indeed interested in protection of the environment, but this was a factor which enhanced their standing to sue.

---

[12] The Supreme Court, in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971). Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) and Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970) recently has made it very clear that where there is no statutory prohibition of judicial review, and there is "law to apply" (here the NEPA) thus removing the situation from the APA exception for action committed to agency discretion by law (denoted "a very narrow exception" in *Overton Park*), *all* agency action is presumed to be reviewable.

IV

The declared purpose of the NEPA[13] is to encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment; to stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation; and to establish a Council on Environmental Quality. It is further stated in subsection (b), 42 U.S.C. § 4331 et seq., that its purpose is to improve and coordinate federal plans, functions, programs and resources to the end that the nation may

> *(5) achieve a balance between population and resource use* which will permit high standards of living and a wide sharing of life's amenities; and
>
> *(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.* 42 U.S.C. § 4331 (emphasis added.)

The statute further *requires* (42 U.S.C. §4332) that all agencies of the federal government shall

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

---

[13] 42 U.S.C. § 4321 et seq.

The statement thus prescribed is to be made available to the President, the Council on Environmental Quality, and the public. This statute does not limit the authority of any governmental agency in any permanent or conclusive manner. It does, however, contain a mandate that action can be taken only following complete awareness on the part of the actor of the environmental consequences of his action and following his having taken the steps required by the Act. It is undeniable that the Act compels the Department to comply with its provisions when action is being taken having to do with a depletable resource. Here also there is evidence of "new and expanding technological advances" directly related to the need for an application of this resource.

It is undisputed that the Secretary has not considered the environmental impact and has not taken any steps to fulfill the requirements of the NEPA. Indeed the Secretary has not even followed the regulations of his own Interior Department purporting to implement the statute. The NEPA also establishes a Council (in 42 U.S.C. §4344). In order to carry out the mandate of the statute the Council must be apprised of agency actions having environmental consequences. It does not appear from the statute that the agency action must await any responsive comments from the Council. Instead, the apparent purpose of the Council is to review federal programs and activities so as to keep the President informed on the extent to which these activities may affect the policies set forth in the Act. Thus, the Council's function is in no way regulatory. Its purpose is to take information and to coordinate the reporting of governmental activities so as to aid the policy makers.

The mandatory nature of the NEPA is emphasized in recent decisions. See, for example, Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971). The de-

cisions are also clear that the mandates of the NEPA pertain to procedure and do not undertake to control decision making within the departments.[14]

As we view it then the purposes of the NEPA are realized by requiring the agencies to assess environmental consequences in formulating policies, and by insuring that the governmental agencies shall pay heed to environmental considerations by compelling them to follow out NEPA procedures.

The Secretary in the instant case proposes to take an action which has environmental consequences, namely rapid depletion of the helium resources of the country. Whether the Secretary's proposed action has significant longrange consequences, or whether the environmental effects are insignificant in relationship to the countervailing government interests, are decisions which are left to the Secretary. The important thing is that he must consider the problem. As was said by the D.C. Circuit in Calvert Cliffs', *supra*:

> The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action.

In oral arguments the appellees have expressed a desire for extensive administrative proceedings. We do not see any such requirement. This is an intra-departmental matter in which the Secretary fulfills his obligation by following the mandate of the NEPA. Neither the APA nor the NEPA compels him to appoint an examiner and conduct hearings. Indeed the Department has NEPA procedures in its manual. He ought to at least follow these. There is no indication that Congress in enacting

---

[14] Texas Committee on Natural Resources v. United States, W.D. Texas, 1 Envir. Rpts—Cas. 1303, 1304 (1970); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F.Supp. 749 (E.D. Ark. 1971); Pennsylvania Environmental Council v. Bartlett, 315 F.Supp. 238 (M.D.Pa.1970).

the NEPA intended to impose extensive procedural impediments to Department action.

Having concluded that the court had jurisdiction in this cause and that the NEPA fully applies to the action here involved, it follows that the District Court acted properly in enjoining the termination program, at least pending the compliance by the Secretary with the NEPA.

We agree with the Secretary that the matter here involved is urgent and should be expedited in every possible way.

The judgment is affirmed.

UNITED STATES DISTRICT COURT
D. KANSAS

March 27, 1971

CIV. A. NO. W-4568

NATIONAL HELIUM CORPORATION, *Plaintiff*,

and

PHILLIPS PETROLEUM COMPANY

and

CITIES SERVICE HELEX, INC., *Intervenors-Plaintiffs*

v.

ROGERS C. B. MORTON, Secretary of the Interior, and ELBURT F. OSBORN, Director, Bureau of Mines, Department of the Interior, *Defendants*.

Memorandum and Order Granting Preliminary Injunction

THEIS, District Judge.

On March 17, 1971, National Helium Corporation filed the instant action against the defendants, Rogers C. B. Morton, Secretary of the Interior, and Elburt F. Osborn,

Director of the Bureau of Mines, Department of the Interior. In its complaint National Helium Corporation seeks judicial review of certain actions of the defendants and declaratory and injunctive relief against the defendants. Since the original complaint was filed, Phillips Petroleum Company and Cities Service Helex, Inc. were allowed to intervene as parties plaintiff. They seek identical relief. All of the plaintiffs have requested this Court to issue a temporary injunction pending final disposition of the cause. A hearing was held on March 25, 1971, to determine whether interim relief in the form of a temporary injunction was warranted. For reasons appearing more fully herein, this relief must be either granted or denied before Sunday, March 28, 1971. This decision calls into question the National Helium Act, 50 U.S.C. §167 et seq., the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and the Administrative Procedure Act, 5 U.S.C. § 551 et seq. Virtually the entire national program of helium conservation under the National Helium Act is involved.

FACTS

Plaintiffs are each engaged in helium extraction operations in the Kansas-Hugoton gas field in southwest Kansas. This field is apparently the greatest source of helium in the free world. Helium extraction is a highly technical and complicated operation whereby the helium is extracted from natural gas prior to the gas being sold as a fuel source.

Pursuant to the National Helium Act the plaintiffs were awarded contracts for the extraction and sale of helium to the Federal Government. The contracts provided in part as follows:

> "12.1 Buyer [Federal Government] may, at its option, terminate this contract at any time if, (1) in the opinion of the Secretary of the Interior, the discovery of large new helium resources or a substantial

diminution in helium requirements or any circumstance of similar nature should occur which would make the continued operation of Seller's plant and the continued purchase of helium-gas mixture extracted therein unnecessary to accomplish the purposes of the Act or any amendment thereto, or (2) a material circumstance of force majeure making it impracticable or impossible for either Buyer or Seller to carry out its obligations under this contract which circumstance cannot be remedied with reasonable dispatch."

On January 26, 1971, the Department of the Interior, through its then Under Secretary, Fred J. Russell, advised the National Helium Corporation that, pursuant to the termination clause of the helium contract, the contract would be terminated, effective sixty days from January 26, 1971. Enclosed with the termination notice was a statement of the reasons for the termination. The substance of the statement was that all four of the helium conservation contracts were being terminated since the continued operation of the contractors' plants and the continued purchase of the helium-gas mixture extracted in such plants was unnecessary to accomplish the purposes of the Helium Act. The statement cited, as factors underlying the decision to terminate the contracts, a substantial diminution in the requirements of helium for essential government activities, the discovery of new helium resources that had been made since the contracts were entered into, and the availability of helium within economic limits because of improved technology from natural gases which would previously have been impractical because of their low helium content.

By letter of February 19, 1971, from the president of National Helium Corporation, Mr. J. F. McElhatton, to the Honorable Rogers C. B. Morton, Secretary of the Interior, National Helium stated its position that "proper grounds for termination do not exist and that procedural

steps necessarily precedent to termination have not been taken."

On March 11, 1971, the defendant Morton, Secretary of the Interior, advised National Helium that the decision was final and would be effective March 28, 1971. The plaintiffs seek review of this action and injunctive relief preventing the contract termination until the defendants comply with the Administrative Procedure Act, the National Helium Act, and the National Environmental Policy Act. They also seek a temporary injunction pending this Court's review of the action of the defendants, which is alleged to be arbitrary and capricious.

JURISDICTION

Before this Court can determine whether the plaintiffs are entitled to a preliminary injunction, it must be determined that they have the right of judicial review of the Secretary's action in terminating the contract in question. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136, March 2, 1971. This Court concludes, for the reasons stated below, that the plaintiffs are entitled to judicial review.

The Helium Act provides in pertinent part as follows:

> "(a) For the purpose of conserving, producing, buying, and selling helium, the secretary is authorized —
>
> (1) to acquire by purchase, lease, gift, exchange, or eminent domain, lands or interests therein or options thereon, including but not limited to sites, rights-of-way, and oil or gas leases containing obligations to pay rental in advance or damages arising out of the use and operation of such properties * * *
>
> (2) to make just and reasonable contracts and agreement for the acquisition, processing, trans-

> portation, or conservation of helium * * *
> 50 U.S.C. § 167a.
>
> * * * * * * * * * *
>
> "(a) The provisions of the Administrative Procedure Act of June 11, 1946, as amended, shall apply to any agency proceeding and any agency action taken under this chapter * * * and the terms 'agency proceeding' and 'agency action' shall have the meaning specified in the Administrative Procedure Act."
> 50 U.S.C. § 167h.

The Administrative Procedure Act defines "agency action" as "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551. That Act also provides that a person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. As recently stated by the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, supra:

> "5 U.S.C. § 701 (Supp. V.), provides that the action of 'each authority of the Government of the United States' * * * is subject to judicial review except where there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.'"

The Secretary's acts in the case at bar do not fall within the exception for action "committed to agency discretion." This is a very narrow exception and not applicable to this case for the reason that there is "law to apply" in the Helium Act itself. Only where there is no "law to apply," due to the fact that the statute conferring the authority upon the Secretary is extremely broad, will this exception preclude judicial review.

As was the situation in *Overton Park*, there is no indication of Congressional prohibition of judicial review

and no showing has been made that Congress intended to restrict access to judicial review. See Abbott Laboratories v. Gardner, 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). As stated by the Supreme Court in that case:

> "The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Id., p. 140, 87 S.Ct. p. 1510.

The availability of judicial review to one suffering a legal wrong as a result of agency action is presumed.

The defendants argue that the case at bar does not involve an "agency action," but rather, an action taken pursuant to a valid contract. Although many acts may be done pursuant to a contract which do not amount to "agency action" within the meaning of the Administrative Procedure Act, and for which no judicial review would be available, the Secretary's actions in the present case are clearly "agency actions" and may be tantamount to an absolute frustration of the purposes set forth in the Helium Act. The Court is cognizant of the fact that the Secretary has the authority to implement such a policy decision, but not without first demonstrating that his actions are in fact the implementation of Congressional policy and are not an arbitrary and capricious act, nor imposed without observance of procedural requirements. Similar situations have been held justiciable under the present Chief Justice Burger's opinion in Gonzalez v. Freeman, 118 U.S. App. D.C. 180, 334 F.2d 570 (1964), and the recent cases of Air Reduction Co. v. Hickel, 137 U.S. App. D.C. 24, 420 F.2d 592 (1969) and Seanwell Laboratories, Inc. v. Shaffer, discussed infra.

Defendants argue that under the legal doctrine of immunity of the sovereign, this Court has no power to act.

However, what has been said concerning applicability of the Administrative Procedure Act nullifies this contention. A long line of well-reasoned cases now hold that the Administrative Procedure Act, where applicable, serves as a waiver of sovereign immunity.

An additional very valid reason entitles the plaintiffs to judicial review. That ground is the recently enacted National Environmental Policy Act of 1969 (NEPA). 42 U.S.C. § 4321 et seq.

The purpose of the NEPA is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment * * *." 42 U.S.C. § 4321. Congress specifically stated in its declaration of environmental policy that "*resource exploitation*" was a factor in declaring that the national policy is "*to use all practicable means and measures*" to promote, create and maintain conditions under which man and nature can exist in productive harmony and fulfill the requirements of present and future generations of Americans. 42 U.S.C. § 4331 (emphasis added).

Section 4331 also provides that in order to carry out this policy it is the continuing responsibility of the federal government to use "all practicable means" to the end that this nation may:

> "(5) achieve a balance between population and *resource use* which will permit high standards of living and * * *
>
> (6) enhance the quality of renewable resources and *approach the maximum attainable recycling of depletable resources.*" Id. (Emphasis added.)

In 42 U.S.C. § 4332, Congress directs, to the fullest extent possible, that the policies, regulations and laws of the United States be interpreted and administered in accordance with these policies. This section also states that all agencies of the federal government *shall:*

> "(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the

natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided in Section 552 of Title 5, and

shall accompany the proposal through the existing agency review processes;

(D) study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter."

The National Environmental Policy Act has been implemented by Executive Order 11514, signed by the President on March 5, 1970, and directs federal agencies to develop procedures for implementing and enforcing the Act. Pursuant to the Act and this Executive Order, the Department of Interior adopted procedures effective September 17, 1970. Part 516 of the Department of Interior. Departmental Manual directs that all Public Laws of the United States administered under the agency jurisdiction should be interpreted and administered in accordance with policies set forth in the National Environmental Policy Act of 1969. Such procedures are made applicable to continuing major federal actions having a significant effect on the environment, even though arising from projects initiated prior to enactment of the Act. The pro-

cedures further direct that an environmental statement shall be submitted to the Council on Environmental Quality on all major actions proposed by the Department which would have a significant effect on the quality of environment. The Department procedures also contemplate public hearings on proposed agency actions with notice of such hearings to include publication in the Federal Register no less than thirty days before the hearing date. Further, the Council on Environmental Quality established by NEPA has issued guidelines for statements on proposed federal actions affecting the environment. 33 Fed. Reg. 1398 (Jan. 22, 1971). These guidelines provide for the preparation of environmental statements on major federal actions significantly affecting the quality of the human environment, and directing all federal agencies, to the fullest extent possible, to direct their policies, plans and programs so as to meet national environmental goals. These guidelines provide in relevant part:

> "The objective of section 102(2) (c) of the Act and of these guidelines is to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action and to assist agencies in implementing not only the letter, but the spirit, of the Act."

This Act has recently been interpreted by federal courts, and is held by this Court as nothing less than a mandate to the Secretary in the case at bar, to either follow the prescribed procedure in taking the relevant action or to show that it is not "possible" within the meaning of the NEPA. This Act must be construed in conjunction with the Helium Act, and in so doing, the Court concludes that it appears that the defendants have failed to comply with these Acts and that the plaintiffs have standing to bring this action. See Wilderness Society v. Hickel, 325 F.Supp. 422 (D.D.C. 1970); Environmental Defense Fund v. Corps of Engineers, etc., 324 F.Supp. 878 (D.D.C. 1971).

STANDING

Even though this Court has determined that the plaintiffs are entitled to judicial review of the Secretary's actions, an additional problem now presents itself due to the fact that the plaintiffs seek, in addition to judicial review, equitable relief in the form of preliminary and permanent injunctions. This, in and of itself, would not be particularly difficult if it were not for the fact that the plaintiffs appear to have an adequate remedy at law for damages under the Tucker Act for the alleged breach of the contracts in question. Hence, the question of standing that has so often troubled the federal courts, now presents itself.

The very recent case of Scanwell Laboratories, Inc. v. Shaffer, 137 U.S. App. D.C. 371, 424 F.2d 859 (1970), contains an enlightening history of the nebulous doctrine of standing. In this case Circuit Judge Tamm, speaking for the Court of Appeals, traces the history of this doctrine from the cases of Massachusetts v. Mellon and Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), to the present time. In *Scanwell* the court considered the impact of the Administrative Procedure Act on cases arising in the course of government procurement and held, inter alia, that government contractors have standing to sue in cases similar to the one at bar. In that case the Court held that an unsuccessful bidder for a government contract had standing to sue to allege an illegality in the manner in which the contract was let.

Also in *Scanwell* there was well articulated the "private attorneys general" theory whereby one who feels aggrieved by administrative action has standing in the public interest to see that governmental action is done legally and within the guidelines of due process.

Independent of the private attorneys general theory of standing, Judge Tamm, in the *Scanwell* case, held that

Section 10 of the Administrative Procedure Act gives jurisdiction to the federal district courts and standing to government contractors to seek review of arbitrary and capricious agency action, and abuse of discretion, or other illegality.

It may seem passing strange to see plaintiffs, the offspring of corporate giants of the oil and gas industry, garbing themselves in the status of private attorneys general for the public interest, yet this Court perceives no valid reason why they cannot assert this role as protector of the public interest, along with their own. The Court finds that plaintiffs do have requisite standing to maintain this action.

THE TEMPORARY INJUNCTION

The Circuit Court of Appeals for the Tenth Circuit has recently stated the well defined legal principles governing this Court in determining whether temporary injunctive relief is appropriate. Crowther v. Seaborg, 415 F.2d 437 (1969). Initially it should be noted that this is a matter directed to the sound discretion of this Court, and that the burden is upon the plaintiffs "to make a prima facie case showing a reasonable probability that [they] will ultimately be entitled to the relief sought." Id. at 439. In addition, the parties seeking the relief must show that in its absence irreparable injury will result.

The Court has previously determined that the National Environmental Policy Act is applicable to the Department of Interior "to the fullest extent possible" in its administration of the Helium Act, as heretofore indicated. No discussion is necessary concerning the obvious importance of the element helium as natural and depletable resource, and a most valuable asset to this nation. Neither is it a debatable point that helium presently existing in the natural gas resources of the Hugoton Field, underlying the States of Kansas, Oklahoma and Texas, and said to

be the world's largest supply of natural gas, will be irretrievably lost in the atmosphere if not extracted as a component part of the production of natural gas from that field.

The evidence before the Court, and specifically the supporting statement of the Undersecretary of Interior attached to his letter of termination, contains no reference to the consideration by the Secretary of the application of the National Environmental Policy Act, nor of the Department's own regulations in that area. It would appear that the basis for decision by the Secretary of Interior to terminate these contracts was not based upon a proper or legal administrative foundation, as required by the contracts in question, the Helium Act, and the National Environmental Policy Act. These deficiencies indicate to the Court a probability of success of the plaintiffs in eventually securing a reevaluation of the termination of the contracts in the light of all the pertinent national policy considerations.

While a determination of the probability of success as a basis for the issuance of an injunction is, as this Court views it, an ephemeral and elusive one, requiring somewhat the entrance of the Court into the administrative process from which it states it will refrain, the Court makes such a determination.

Moving to the next step necessary as a prerequisite to injunction, the Court believes that a present evidentiary basis exists for irreparable injury to the plaintiffs and the public interest if such contracts are immediately and summarily terminated as of 8:00 a.m. Sunday, March 28, 1971. This finding of irreparable harm is based on the evidence before the Court in the form of affidavits and the apparent admission just this week by officials of the Department of Interior at a hearing before the Senate Subcommittee on Minerals, Materials, and Fuels, of the Committee on Interior and Insular Affairs, that relevant in-

quiry and consideration was not given to the effect of the decision to cancel the helium contracts in the light of the National Environmental Policy Act. The conclusion reached by the Undersecretary of the Interior in his statement of January 26, 1971, supporting the proposed termination of the production and storage contracts before the Court, is not supported by sufficient findings and determinations to permit adequate judicial review of the correctness of these determinations in a preliminary hearing, and the status quo should be maintaind pending a hearing before the Court on the merits of the action or, in lieu thereof, a reconsideration by the Department of Interior of its action in the light of applicable substantive and procedural due process requirements. Preliminary injunction should issue to prevent the proposed termination of the contracts which are the subject matter of this action. Such action will not unduly inconvenience the defendants, since the helium produced during the interim period shall be purchased pursuant to existing contract terms and will be stored in the underground storage facility at Amarillo, Texas.

It is hereby ordered, this 27th day of March, 1971:

That the defendants, their agents and employees, are temporarily enjoined from taking any action leading to the termination of the National Helium Program and the implementing Contracts No. 14-09-0060-2429, No. 14-09-0060-2434, and No. 14-09-0060-2424, and it is further ordered that such contracts shall be continued and remain in full force and effect pending further order of this Court;

Provided that plaintiffs give security in the sum of $75,000.00 for the payment of such costs and damages as may be incurred by defendants if they are found to have been wrongfully restrained, such security to be in the form of a Certified Check or a Bond approved by the Clerk of the Court.

February 2, 1973

Termination of Helium Purchase Contracts

Notices have been issued terminating the three helium purchase contracts listed below:

Contract No. 14-09-0060-2424, dated August 22, 1961, with Cities Service Helex, Inc.

Contract No. 14-09-0060-2429, dated October 13, 1961, with National Helium Corporation

Contract No. 14-09-0060-2434, dated November 13, 1961, with Phillips Petroleum Company

The notices, dated February 2, 1973, provide that the contracts shall terminate sixty days after the mailing of the notices at 8:00 a.m. CST. This action follows an evaluation of the environmental consequences of the termination of the three contracts and an equally careful consideration of the option provided the Government by the termination provisions of the contracts.

ENVIRONMENTAL ASPECTS

The direct result of termination of the three helium purchase contracts would be that the Government would forego the purchase and storage of an estimated 20 billion cubic feet of helium during the next ten years. There would likely be two consequences of importance from the environmental standpoint: all or part of these helium resources will be "wasted" or "depleted" and helium will pass into the atmosphere.

The passage of helium into the atmosphere presents no threat to the physical environment. Helium is a harmless gas—odorless, colorless, and inert.

"Wastage" or "depletion" of helium may result from termination because the contractors might either permit the helium to remain in the gas stream and thus be lost when the gas is burned or continue to extract the helium

and then vent it into the atmosphere. In either event, the particular helium that would otherwise be stored would be lost. Whether this occurs is not within the control of the Government and I can do no more than recognize that possibility.

Of greater concern is the possibility that the failure to store this 20 billion cubic feet of helium now will preclude the adoption of some environmentally beneficial technology in the future because recovery of helium at a later date will be too costly or will be attended by unacceptably adverse environmental effects. This requires an appraisal of the future supply-demand situation, a matter to which I now turn.

The Department's Final Environmental Statement and the comments received survey the uses of helium, actual and potential, and identify two factors which increase the difficulty of making reliable estimates of future helium demand. In many instances, while helium may be preferable, it is not indispensable and there are acceptable substitutes. In fact, helium has been considered indispensable only in the field of cyrogenics—to produce very low temperatures and to create the phenomenon called superconductivity. Second, as experience has shown, helium may be excluded from, or quantitatively play a less important part in, the application of tehnology which it served to develop. The space program is illustrative.

Natural gas—primarily fuel gas—is the only known source of helium other than the atmosphere. The helium content of the atmosphere remains constant at about 5 parts per million, and helium can be recovered from the atmosphere. Yet although the atmosphere is an assured source of helium, recovery from the atmosphere of large quantities of helium as a primary product is, at present, not an attractive prospect because of cost and energy requirements and problems of pollution associated with the generation of energy. For example, it has been esti-

mated that the power requirements to extract one billion cubic feet of helium from the atmosphere would be 26,000 megawatts. In the unlikely event that this amount of power were to be generated using coal for fuel and current use technology, it would add about 670,000 pounds per hour of pollutants to the atmosphere and increase thermal pollution by almost 4 trillion BTU per day. It is estimated that the cost of recovery from the atmosphere would range from $1000 to $3000 per thousand cubic feet of helium.

The Stanford Research Institute and the Bureau of Mines have made the most recent projections of total future demand for helium in the United States, and these estimates appear in the Department's Final Environmental Statement. The forecasts through the year 2000 vary from SRI's high range estimate of about 5 billion cubic feet for the year 2000 to the low range estimate by the Bureau of Mines of 1.4 billion cubic feet for that year. SRI also has forecast demand for the years 2025 and 2050 on alternative bases related to price and supply: 8.9 or 17.9 billion cubic feet for the year 2025 and 23.2 or 67.5 billion cubic feet for the year 2050. These estimates take account in various degrees of various possible uses of helium, such as synthetic mixtures for underwater work, high temperature gas cooled nuclear reactors, superconducting power lines, magnetohydrodynamic power generation, superconducting electric motors and generators, high speed ground transportation systems, and generation of power by controlled nuclear fusion.

Some of the comments on the Final Environmental Statement forecast requirements for specific areas of use. Thus, the Bonneville Power Administration opined that by the year 2000 approximately 5 billion cubic feet of helium might be required for electrical power use. The Lawrence Radiation Laboratory "has a projection" that, within the

next fifty years, there will be 87 nuclear fusion plants with an inventory of from 20 to 30 billion cubic feet of helium. Perhaps demands for helium for some or all of the potential uses (or for uses not now known) will materialize, but the magnitude of such demands is speculative and, in respect of any process, dependent upon successful research and development, and upon the extent to which the process is actually adopted and put to use.

In view of the uncertainties of the future and the experience of the past years, it would not be realistic to attribute a high degree of reliability to the estimates either of SRI or of the Bureau of Mines through the year 2000. Actual use of helium during the years 1970 and 1971 was well below the quantities forecast in any of the estimates for these years, and the data available for 1972 indicate that this trend is continuing. Forecasts of demands for helium 50 to 75 years hence have even more questionable credentials for reliability.

Yet the estimates made by SRI and by the Bureau of Mines do serve to indicate one aspect of the problem of calculating environmental impacts from speculative data. As the analysis made in the Final Environmental Statement shows, an additional 20 billion cubic feet of helium stored by the Government would not contribute significantly to the satisfaction of demands of the magnitude forecast in the estimates through the year 2000. If any of these forecasts should prove accurate, twenty billion cubic feet of stored helium would only provide 4 to 15 years additional supply of helium under these estimates; after such a period, helium would have to be obtained from sources other than proved reserves. On the other hand, actual use of helium has trended downward for the past several years; if this trend were to continue, the 20 billion cubic feet might satisfy demand for many more years. However, should lower demand prove to be the case into the future, the additional helium would not be

needed until so far into the twenty-first century as to make consideration of its use nothing more than rank speculation.

If forecasts of future demand are conjectural, no claim of certainty can be made with respect to the future supply of helium other than in the atmosphere, but it appears that the nation will not be faced with the prospect of recovering helium from the atmosphere for some time to come. To avoid any confusion in this connection, I should point out that the availability of natural gas is assessed, not in terms of future demands for energy, but in terms of future requirements for helium.

As of January 1, 1971, the Bureau of Mines estimated that something over 126 billion cubic feet of helium were contained in proved reserves of "helium rich" natural gas (containing at least 0.3 percent helium). Further, there are now proved shut-in reserves of "helium rich" gas; the Bureau of Mines has estimated that such reserves contain about 10 billion cubic feet of helium. Probable shut-in reserves in helium rich natural gas have been estimated at between 17 and 24 billion cubic feet. Finally, the Government now has 35 billion cubic feet of helium in storage in the Cliffside field in Texas and it is estimated that about 4 billion cubic feet of helium are contained in the Government-owned native gas in that field. The Bureau of Mines anticipates that 5.5 billion cubic feet of helium will be recovered in its Keyes plant under an exclusive "life of the field" gas supply agreement. Thus, the Government has an assured supply of about 44.5 billion cubic feet of helium.

Apart from helium in storage and proved reserves, there is a reasonable expectation that considerable quantities of natural gas containing helium will be discovered in the future, although it is probable that the helium content of such gas will be "leaner"—that is, less than 0.3 percent by volume. In commenting on the Department's Draft Environmental Statement, the contractors submitted a fore-

cast that 589 billion cubic feet of helium would be contained in natural gas produced during the period 1971-2005, and more than 300 billion cubic feet would be contained in natural gas produced during the period 1986-2005. The Bureau of Mines has estimated that over 500 billion cubic feet of helium will be available from natural gas discovered during the period ending with the year 2030. Therefore, considerable amounts of yet-to-be-discovered helium will probably be available to meet future helium needs.

Finally, I turn briefly to the costs of recovering helium from sources other than "helium rich" natural gas, since too costly helium might discourage the use of environmentally beneficial technology which is dependent upon helium. As I noted above, estimates of recovering helium from the atmosphere range from $1000 to $3000 per Mcf. Cost estimates for recovering helium from leaner gases range from about $50 per thousand cubic feet of helium recovered from natural gas containing 0.1 percent of helium to a range of $500 to $700 per thousand cubic feet recovered from natural gas containing only 0.006 percent of helium. These costs must be compared with the cost of obtaining helium from rich gas at the present time and then storing it. Storing this relatively cheap helium now for use in the future does not necessarily result in "low cost" helium. For the helium in storage, the Government is now paying an average price of $13 per thousand cubic feet with funds borrowed from the Treasury. If helium purchased today at this price were to be held either until the year 2000 or the year 2030, the value of each 1000 cubic feet (compounding at 10 percent) would be $170 and $2973, respectively; if the cost were compounded at 6 percent, the value in the year 2000 and 2030 would be $63 and $360 per Mcf, respectively.

Research and development during the last quarter of this century should bring clearer perceptions of the feasibility—scientific, environmental, and commercial—of various processes which require helium and promise environmental advantages, and judgments as to the magnitude of helium requirements will rest on firmer ground. Over this period

of time, the prospect is that private industry will be able to obtain helium to use, and to store for use, in processes which "prove out" at costs which will not be prohibitive. Further, it is improbable that any of the presently stored helium will be required to meet demands through the next decade, and it may well be that none of it will be used before the turn of the century or beyond.

As can be seen from the circumstances discussed above, it is possible that demand may outrun the supply of helium recoverable from natural gas, thus forcing recourse to recovery from the atmosphere. In this event, assuming no advance in present technology, there would be adverse environmental impacts resulting from the large amounts of energy which would be needed or from the inability to adopt environmentally beneficial technology due to the high cost of helium. However, since such considerations are based upon technology which is still to be developed and applied and which, if successful, may require considerably less helium than has been so freely forecast, I do not believe that these risks alone are sufficient as the basis for continuing the contracts or for greatly expanding the helium conservation program. Parenthetically, it ought to be noted that if it is assumed that enormous requirements for helium will materialize in twenty-five, fifty, or seventy-five years, only the latter alternative—a greatly expanded helium conservation program—would satisfy such requirements. Storage of an additional 20 billion cubic feet of helium would merely postpone, for a relatively short period of time, the environmental impacts attendant upon recovery from the atmosphere and continuation of the contracts would do little to solve helium needs in such circumstances.

I am fortified in my judgment by the realization that helium is not an "irretrievable" resource. It can be obtained from the atmosphere, and it is by no means clear that the incremental costs of obtaining helium from the atmosphere in the year 2025 or 2050 will be so high as to delay or preclude the adoption of technology to which environmental advantages are attributable. Further, by that

time, extractive processes may have been developed which may have significantly less adverse impact upon the environment than is presently foreseen. To summarize, the adverse environmental effects of terminating these three contracts are so problematical as not to warrant further expenditures in this area, as the purposes of the Helium Act have been achieved.

CONTRACTUAL ASPECTS

By issuing the notice of termination of the three helium purchase contracts, I have exercised the option which each of the contracts provides to the Government. The termination provision in the contract with Cities Service Helex, Inc., reads as follows:

> "12.1 Buyer may, at its option, terminate this contract at any time if any of the following circumstances or any other circumstance of similar nature should occur which, in the opinion of the Secretary of the Interior, would make the continued operation of Seller's plant and the continued purchase of helium-gas mixture extracted therein unnecessary to accomplish the purposes of the Act or any amendments thereto: (1) the discovery of large new natural helium resources, or (2) a substantial diminution in helium requirements. Upon such termination, the provisions of paragraph 13.1 shall apply."

The termination provision in the contract with Phillips Petroleum Company is identical, except for the fact that the latter provision mentions Phillips' two plants. The termination provision in the contract with National Helium Corporation reads as follows:

> "12.1 Buyer may, at its option, terminate this contract at any time if, (1) in the opinion of the Secretary of the Interior, the discovery of large new helium resources or a substantial diminution in helium requirements or any circumstance of similar nature should

occur which would make the continued operation of Seller's plant and the continued purchase of helium-gas mixture extracted therein unnecessary to accomplish the purposes of the Act or any amendment thereto, or (2) a material circumstance of force majeure making it impracticable or impossible for either Buyer or Seller to carry out its obligations under this contract which circumstance cannot be remedied with reasonable dispatch."

On January 26, 1971, a determination was made by the Under Secretary of the Interior that the continuation of the three helium purchase contracts was unnecessary to achieve the objectives of the Helium Act to provide, within economic limits, "a sustained supply of helium, which, together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Government activities." The Under Secretary reached this conclusion in light of the substantial diminution in Government requirements for helium since 1966, particularly when there was taken into account the new discoveries of helium resources that had been made since the execution of the contracts and the availability within economic limits of helium from a much wider range of natural gases than was apparent before 1961, the year in which each of the three contracts was consummated.

The actions taken by the Under Secretary in January of 1971, to terminate the three contracts did not become effective because of the issuance of an injunction resting on the procedural requirements of the National Environmental Policy Act. That injunction has now been interpreted in a fashion which permits me to consider this matter.

I have reviewed the circumstances pertaining to these helium purchase contracts, and I am persuaded that the determination made by the Under Secretary in 1971 was sound, and in my view, the justification for termination is even clearer now than in January of 1971.

The purposes of the Helium Act are stated in Section 15 (50 U.S.C. § 167m), which provides as follows:

> "It is the sense of the Congress that it is in the national interest to foster and encourage individual enterprise in the development and distribution of supplies of helium, and at the same time provide, within economic limits, through the administration of this chapter, a sustained supply of helium which, together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Government activities."

While uses of helium other than by the Government are mentioned in discussions of the bill (H.R. 10548, 86th Cong.) which became the Helium Act Amendments of 1960, and in the Committee reports on the bill, each report states that:

> "The primary objective of H.R. 10548 is to furnish authority to the Department of the Interior to carry out an effective, long-range program for the production, distribution, and storage of helium in order to assure a sustained supply, taking into account supplies from other sources, to meet essential Government needs * * *." (H.R. Rep. No. 1552, 86th Cong., 2d Sess. 2 (1960); S. Rep. No. 1814, 86th Cong., 2d Sess. 1 (1960).)

The section-by-section analysis of the bill in the House Report states that:

> "Section 14 [later renumbered as section 15] states the policy of the Congress favoring individual enterprise in the helium industry while relying principally upon administration of the act to assure helium for essential Government activities." (H. Rep. No. 1552, 86th Cong., 2d Sess. 8 (1960).)

The Senate Committee Report on H.R. 10548 contains a similar discussion of that section (as renumbered):

> "Section 15 declares the sense of the Congress that it is in the national interest to foster individual enter-

prise in the development of the helium industry while relying principally upon administration of the act to supply helium for essential Government activities." (S. Rep. No. 1814, 86th Cong., 2d Sess. 10 (1960).)

Section 15 did not appear in the bills submitted to the Congress by the Department or in H.R. 10548 as introduced. The House added the section, for reasons explained by the House Committee:

> "A new section 14 [the present section 15] containing a policy statement was added. It emphasizes the need to foster individual initiative and avoid Government monopoly in helium production and distribution as the volume of helium produced and consumed increases, and declares that Government operations under the Act should, with other sources, be on a scale sufficient to assure a sustained supply of helium for essential Government activities." (H.R. Rep. No. 1552, 86th Cong., 2d Sess. 5 (1960).)

In the termination provisions, each of the circumstances of termination is related to the "purposes of the Act." Accordingly, the termination provisions permit termination by the Government if a substantial diminution in helium requirements for essential Government activities has occurred such that it is no longer necessary for the Government to purchase and store helium to provide a sustained supply for such activities. It is clear to me that such a diminution has occurred.

The execution in 1961 of the three helium purchase contracts under consideration here, and of a fourth contract with Northern Helex Company, was the culmination of a conservation program which resulted from concerns expressed in the 1950's by Government agencies. During this period, the Government was the sole producer and the principal user of helium (either directly or through its contractors), and conservation was pressed primarily to assure further availability of helium for defense and atomic energy programs.

In the decade between fiscal years 1947 and 1959, the use of helium by Federal agencies showed a steady increase. Direct sales to the agencies grew from 30 million cubic feet in fiscal year 1948 to 247 million cubic feet in fiscal year 1958. In the succeeding fiscal year, such sales amounted to 277 million cubic feet. In July 1959, this Department submitted to the Congress a legislative proposal looking to a conservation program. The Helium Act Amendments of 1960 became law in September 1960, and all of the helium purchase contracts were entered into during the last six months of calendar year 1961 (the first six months of fiscal year 1962). An assumption that demands for helium would continue steadily to increase underlay both the legislative and contractual activities, and this assumption was born out for a time, as shown by the following table, which includes sales of the Bureau of Mines, and estimated sales of private producers, for Government activities:

Government Requirements for Helium
(Million Cubic Feet)

FY	Quantity
1960	355
1961	446
1962	530
1963	540
1964	565
1965	555
1966	684
1967	680
1968	670
1969	578
1970	400
1971	325
1972	280

In fiscal year 1966, Government demand peaked at 684 million cubic feet. In fiscal years 1967 and 1968, Government requirements were somewhat below this level. A sharp decline began in fiscal year 1969, as the table shows. In six years, Government requirements for helium per fiscal

year have fallen steadily from a high of 684 million cubic feet to a low of 280 million cubic feet.

The figures set out above also show that Government requirements have fallen below the level for fiscal year 1961, the fiscal year in which the Helium Act Amendments of 1960 were passed and took effect and the fiscal year preceding the consummation of the helium purchase contracts. During that fiscal year, the Bureau of Mines was still the sole producer of helium and sold 446 million cubic feet of helium directly to Government agencies. In fiscal year 1970, Government requirements fell below that level. They have continued to decline. In fiscal year 1972, Government requirements were about 37 percent below the 1961 level, and there is no reasonable prospect of a substantial increase for the next quarter of the century.

In 1969, the five major helium-using Government agencies (NASA, DOD, AEC, Weather Bureau, National Bureau of Standards) submitted estimates of their respective helium needs through the year 2000. The estimated future helium requirements of those agencies, as of 1969, for the period 1970-2000 were approximately 47 billion cubic feet, of which some 42.9 billion cubic feet represented the estimated needs of NASA. Only one of these agencies, NASA, forecast a substantial increase in requirements and that estimate has since been reduced. The 1969-1970 estimates of the five agencies were as follows:

	Annual requirements (million cubic feet)					
Time Period	NASA	DOD	AEC	WB	NBS	Total
1970-1972	150	60	56	9.5	0.4	275.9
1973-1975	500	60	56	9.5	0.4	625.9
1976-1980	1,000	60	56	9.0	0.4	1,125.4
1981-1985	1,600	76	56	8.0	0.4	1,740.4
1986-1990	1,600	76	56	7.0	0.4	1,739.4
1991-1995	2,000	71	56	5.0	0.4	2,132.4
1996-2000	2,000	71	56	4.0	0.4	2,131.4
Total: 1970-2000	42,950	2,130	1,736	222.0	12.4	47,050.4

As stated above, the Government has an assured supply of about 44.5 billion cubic feet of helium, comprising 35 billion cubic feet stored in the Cliffside field, about 4 billion cubic feet in the native gas in that field, and 5.5 billion cubic feet available to the Government under an exclusive gas supply agreement. The total quantity of 42.4 billion cubic feet would come very close to meeting the Government requirements of 47 billion cubic feet, as estimated in 1969-1970 for the period 1972-2000, and there is little doubt that shut in reserves or "leaner" gases would constitute adequate sources of supply if a "deficiency" materialized.

Now, however, the estimated requirements of the agencies are of a much lower order of magnitude. As updated in 1972, the estimated requirements of the agencies are as follows:

Annual requirements (million cubic feet)

Time Period	NASA	DOD	AEC	WB	NBS	Total
1972	76	60	43	9.5	0.6	189.1
1973-1975	84	60	43	9.5	0.6	197.1
1976-1980	63	60	44	9.0	0.6	176.6
1981-1985	79	76	44	8.0	0.6	207.6
1986-1990	95	76	45	7.0	0.6	223.6
1991-1995	150	71	45	5.0	0.6	271.6
1996-2000	150	71	46	4.0	0.6	271.6
Total	3,013	2,130	1,305	222.0	40.0	6,710.0

(All totals may not add as some agencies have given average annual use and a total use figure for the 1972-2000 period.)

The 1972 forecast is over 39 billion cubic feet less than the earlier one and reduces estimated Government needs for the period 1972-2000 from 46.5 billion cubic feet to approximately 7 billion cubic feet. It now appears that 44.5 billion cubic feet of helium would more than meet Government requirements for helium during the period 1972-2000. This

is a consequence of recent advice from NASA, contained in a letter dated July 12, 1972, as to its requirements. The estimates provided in that letter show a significant decrease from the similar ones made by NASA in 1969-70. They are set forth below:

NASA Estimates

Average Annual Requirements (Million Cubic Feet)

Fiscal Year	1969-70 Estimates	July 1972 Estimates
1972	150	76 [actual]
1973-75	500	84
1976-80	1,000	63
1981-85	1,600	79
1986-90	1,600	95
1991-2000	2,000	150
Total for *All* years in period	42,650	3,013

Forty-four billion cubic feet of helium would be more than six times as much as would be necessary to meet the needs of essential Government activities as now projected through the year 2000; forecasts beyond this period would, in my opinion, merely be exercises in conjecture. The Helium Act was not, in my judgment, designed to encourage conservation based upon speculative possibilities as to the needs of essential Government activities so far in the future as to be wholly conjectural. The action of the Congress in thrice rejecting requests made by this Department (in 1963, 1965 and 1967) to expand the conservation program seems to me to be a Congressional articulation of this view.

In these circumstances, I am persuaded that the substantial diminution in helium requirements which is described above makes it unnecessary to continue the contracts to accomplish the purposes of the Helium Act.

The conclusions set forth above have, of course, been reached in the light of an interpretation which finds that the purposes of the Helium Act are set out in Section 15 of that Act. I am convinced that this interpretation is correct, but even if the purposes of the Helium Act were assumed, despite the specific language of Section 15, to look also to the satisfaction of the requirements (in some unspecified degree) of the private sector, I am of the opinion that there has been such a substantial diminution in total requirements for helium as to make the continuation of the contracts unnecessary to accomplish the purposes of the Act conceived in this new light.

This conclusion results when the diminution in requirements is considered in the light of the quantity of helium which the Government has and will have in storage, the existence of a private helium industry, and the reasonable prospect of the availability to the private sector of helium, other than stored helium, at realistic costs through the turn of the century.

In the last 12 years, total domestic demand has followed a pattern similar to that of Government demand, as shown below:

FY	Total Domestic Demand
1960	415
1961	516
1962	602
1963	621
1964	686
1965	675
1966	837
1967	897
1968	893
1969	788
1970	600
1971	507
1972	440

These figures do not include exports. I find it difficult to assume either that the Congress intended to authorize the

conservation of helium for the purposes of exportation or that the parties to the contracts had such a "requirement" in mind.

In fiscal year 1967, the peak year in domestic helium demand, sales (exclusive of exports) reached 897 million cubic feet; sales in the following years were: 893 million cubic feet in fiscal year 1968, 0.5 percent below the 1967 peak; 788 million cubic feet in fiscal year 1969, 12.2 percent below 1967; 600 million cubic feet in fiscal year 1970, 33.2 percent below 1967; 507 million cubic feet in fiscal year 1971, 43.5 percent below 1967; 440 million cubic feet in fiscal year 1972, 50 percent below 1967. Thus, in a period of five years, domestic demand has been reduced to only one-half of what it had been in fiscal year 1967. In fiscal years 1971 and 1972, total domestic demand fell below the level of fiscal year 1961, the year in which the Helium Act Amendments of 1960 were passed, and of fiscal year 1962, the year in which the contracts were made. So far as actual demand is concerned, this would seem to be a substantial diminution.

It is quite clear from Section 15 of the Helium Act that the Congress sought to encourage the development of a private helium industry and contemplated that even the Government might obtain helium from sources other than helium purchased for conservation under the Act. It seems entirely unlikely, therefore, that the Congress contemplated the purchase and conservation by the Government of sufficient helium to satisfy the speculative needs of the private sector in the far distant future. As in the case of Government demand, I would regard forecasts beyond the turn of the century as highly conjectural. For the period ending with the year 2000, three estimates of demand for helium have been published: an estimate made by the Bureau of Mines in 1959, estimates of the Bureau made in 1969, and estimates made by Stanford Research Institute at the request of the contractors in 1969 and 1970. For

the period 1972-2000 the cumulative requirements for helium in these estimates are as follows:

			Billion Cubic Feet
Bu Mines	1959		55
Bu Mines	1969	High	69
		Median	51
		Low	33
SRI	1969		87
SRI	1970	High	76
		Low	68

In view of the decrease in NASA's projection of its helium requirements, the accuracy of these estimates is very questionable. All of them are based in some part upon the requirements of Government agencies, and particularly of NASA, since in recent years this has been the major component of total demand. SRI, for example, in its 1970 report, points out that aerospace activities represent the largest single use of helium and that, while other uses will gain in relative importance, aerospace use will remain important. Indeed, this report projects aerospace as the largest single end use of helium through the year 2000, amounting to about 40 percent of total demand in 1971 and declining to 36.6 percent of total demand in the year 2000 under the 1970 low estimate and 32 percent under the 1970 high estimate. The Bureau of Mines estimates also anticipate that the importance of aerospace end use (purging and pressurizing) will continue, although to a lesser extent in its low estimate. Since NASA has now radically revised its forecasts downward, the Bureau of Mines and SRI estimates now appear to be seriously inflated.

These circumstances have less applicability to the Bureau of Mines 1969 low estimate of 33 billion cubic feet. However, this estimate could be more than filled by the 44 billion cubic feet assured supply.

In addition, a comparison of actual domestic demand with the various estimates shows that these estimates have often proved to be too high. Beginning in 1963, actual demand fell below the demand anticipated in the 1959 projection, even though a steady increase in sales was being maintained. This less-than-predicted increase in actual sales continued through fiscal year 1967, followed by a decline in actual sales. The extent to which actual domestic demand has fallen below the 1959 estimates is shown, for the period 1963-1972, in the following table:

Fiscal Year	1959 Projected Demand	Domestic Demand (excluding exports)	Percent Below Projection
1963	675	621	8
1964	765	686	10.3
1965	860	675	21.5
1966	957	837	12.5
1967	1,056	897	15.1
1968	1,153	893	22.5
1969	1,247	788	36.8
1970	1,337	600	55.1
1971	1,421	507	64.3
1972	1,498	440	70.6
Total	10,969	6,944	36.7

Thus, actual demand has not matched the 1959 projection for any fiscal year in the last decade, even though the two tracked very closely for the first three or four years.

An appraisal in light of actual experience shows demand projected by the Bureau of Mines in 1969 and by the Stanford Research Institute in 1969-1970 to be far in excess of actual demand. To date, the Bureau of Mines 1969 low projection comes closest to domestic demand although it, too, is higher than the demand that has materialized to date. The degree to which actual demand has fallen short of the various projections is shown in the following comparison. The lower set of figures shows the percentages

by which the respective projections exceeded domestic sales.

Fiscal Year	Actual Domestic Sales	Bureau of Mines 1969 Low	Bureau of Mines 1969 Median	Bureau of Mines 1969 High	SRI 1970 Low	SRI 1970 High
1970	600	650	650	700	750	894
1971	507	660	680	740	820	961
1972	435	680	700	820	890	1,042
1970	—	7.7%	7.7%	14.3%	20%	32.9%
1971	—	23.3	25.5	31.5	38.2	47.3
1972	—	36.1	37.9	47	51.2	58.3

These substantial disparities do not augur well for the reliability of any of the estimates. There seems to me to be little likelihood that Government helium in storage will be called upon to satisfy any requirements during the last quarter of this century, and private industry can be expected to satisfy most, if not all, the demands of the private sector for this period of time. In these circumstances, I am of the opinion that it is unnecessary to continue the contracts to accomplish the purposes of the Helium Act, even if those purposes be conceived as encompassing more than the needs of essential Government activities.

There has been, in addition to substantial diminution in helium requirements, the discovery of large new natural helium resources, which, in my opinion, is a second factor making the continued operation of the four helium extraction plants in question and the continued purchase by the Government of helium-gas mixture extracted therein unnecessary to accomplish the purposes of the Helium Act.

For some 55 years, the Bureau of Mines has conducted a program to locate and evaluate helium-bearing natural gas. Under this program, samples of gases from wells, fields, and pipelines throughout the United States are obtained, on a voluntary basis, and analyzed for various components, particularly helium. Since the program began almost 13,000 gas samples have been collected and analyzed. These data provide the basis for the estimates of the helium

reserves of the United States which are made by the Bureau of Mines.

As of January 1, 1971, the Bureau of Mines estimated that there were 10.3 billion cubic feet of proved reserves of helium in helium-rich natural gas which were not known when the helium purchase contracts were entered into and which are located in fields that are shut in or in fields containing gas the heating value of which is too low to be considered fuel gas.

A principal new discovery of helium resources since the contract were entered into is the helium-rich natural gas in certain horizons of the Tip Top field in Sublette County, Wyoming. The natural gas in these horizons has very low heating value and the horizons are shut in at the present time. On the basis of the well which has been drilled in these horizons and evaluation by the Bureau of Mines, the field is deemed to constitute a proved reserve of some 3 billion cubic feet of helium.

Other new discoveries since 1961 constitute additional proved reserves of some 7.3 billion cubic feet of helium for total discoveries of about 10.3 billion cubic feet in proved reserves since that date. This current estimate of total proved reserves represents an increase of some 2.3 billion cubic feet over the total estimated in 1970. The increase is reflected in an updated evaluation made by the Bureau of Mines of these reserves. While this evaluation also revised downward from 24 billion to 17 billion cubic feet the quantity of helium contained in probable shut-in reserves of helium rich gas, an estimated total of about 27 billion cubic feet of helium in proved and probable shut-in reserves would seem to establish beyond reasonable doubt the availability for essential Government activities of a sustained supply of helium such as is contemplated by the Helium Act. These reserves exist in the context of a substantial diminution in Government requirements, a pros-

pective Government demand of 7 billion cubic feet through the turn of the century, and an assured supply to the Government of 44.5 billion cubic feet of helium without further purchases under the contracts. The Bureau of Mines is of the opinion that the cost of producing the shut-in reserves (which are helium-rich natural gases containing a minimum of 0.3 percent helium by volume) would be from $10 to $20 per thousand cubic feet of helium, well within economic limits.

Under the termination provisions of the contracts, the option to terminate may be exercised by the Government upon the existence of a circumstance, similar in nature to substantial diminution in helium requirements or discoveries of large new natural resources, which renders unnecessary the continued operation of the plants and the purchase and storage of helium to accomplish the purposes of the Helium Act.

When the Department presented its conservation program to the Congress in 1960, the emphasis was on recovery of helium from natural gases containing more than 0.3 percent helium. Prior to that time, no one had recovered helium from gas streams containing less than 0.9 percent helium. One of the alternatives mentioned was the recovery of helium from the air (at costs in the order of $1000 to $2000 per thousand cubic feet), but no consideration was given to the possibility of recovering helium from leaner gases—that is, natural gases containing less than 0.3 percent helium. Since 1961, helium has been recovered from gas streams containing on the order of 0.4 percent helium.

In 1968, the Bureau of Mines began an evaluation of the "leaner" natural gases as a source of helium. In that year, the Bureau reviewed the possible and speculative reserves forecast by the Potential Gas Committee. The Bureau estimated that these natural gas reserves would,

respectively, contain 218.9 billion and 309.5 billion cubic feet of helium. These reserves are expected to be "leaner" gases, containing on the order of 0.1 percent of helium. As mentioned earlier, the contractors have submitted a forecast that almost 600 billion cubic feet of helium will be contained in natural gas produced between 1971 and 2005.

Since the execution of the contracts, it has become clear that the "know how" exists to recover helium economically from these leaner gases. Estimates of cost range from about $50 per thousand cubic feet of helium recovered from natural gas containing 0.1 percent of helium to a range of $500 to $700 per thousand cubic feet of helium recovered from natural gas containing only 0.006 percent of helium. In the unlikely event that Government requirements should burgeon so enormously over the next quarter of a century as to exhaust the assured supply of 44.5 billion cubic feet and the helium available in shut-in reserves of helium rich gas, I am convinced that leaner natural gases discovered in the future will afford an adequate source of helium at prices that are not economically unrealistic. This circumstance is, in my opinion, an additional reason why the continuation of the contracts is unnecessary to accomplish the purposes of the Helium Act.

/s/ ROGERS C. B. MORTON
Secretary of the Interior

STATUTES

National Environmental Policy

§ 4321. Congressional declaration of purpose.

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. (Pub. L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.)

SUBCHAPTER I.—POLICIES AND GOALS

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

§ 4331. Congressional declaration of national environmental policy.

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the

social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

§ 4333. Conformity of administrative procedures to national environmental policy.

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

§ 4334. Other statutory obligations of agencies.

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§ 4335. Efforts supplemental to existing authorizations.

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

* * * * * * * * * *

The Helium Act, 50 U.S.C. § 167 et seq. (1970)

§ 167. Definitions.

As used in this chapter:

(1) The term "Secretary" means the Secretary of the Interior;

(2) The term "person" means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, or State or political subdivision thereof; and

(3) The terms "helium-bearing natural gas" and "helium-gas mixture" mean respectively, natural gas and gas mixtures containing three-tenths of 1 per centum or more of helium by volume.

§ 167a. Authority of Secretary.

(a) *Conserving, producing, buying and selling helium.*

For the purpose of conserving, producing, buying, and selling helium, the Secretary is authorized—

(1) to acquire by purchase, lease, gift, exchange, or eminent domain, lands or interests therein or options thereon, including but not limited to sites, rights-of-way, and oil or gas leases containing obligations to pay rental in advance or damages arising out of the use and operation of such properties; but any such land or interest in lands may be acquired by eminent domain only when the Secretary determines (A) that he is unable to make a satisfactory agreement to acquire such land or interest in land, and (B) that such acquisition by eminent domain is necessary in the national interest;

(2) to make just and reasonable contracts and agreements for the acquisition, processing, transportation, or conservation of helium, helium-bearing natural gas, or helium-gas mixtures upon such terms and conditions, and for such periods, not exceeding twenty-five years, as may be necessary to accomplish the purposes of the chapter, except that the Secretary shall not make such contracts and agreements which shall require payments by the Government in any one fiscal year aggregating more than the amount which shall be established initially in an appropriation Act and which may be increased from time to time in appropriation Acts, or if the Secretary—

(A) determines that the national interests require the conservation of certain helium or require certain helium-bearing natural gas or certain helium-gas mixture for the production or conservation of helium, and

(B) determines that he is unable to acquire such helium, helium-bearing natural gas, or helium-gas mixture upon reasonable terms and at the fair market value,

he is authorized to acquire by eminent domain such helium and so much of such helium-bearing natural gas or helium-gas mixture as is necessarily consumed in the extraction of such helium after removal from its place of deposit in nature and wherever found, or the temporary use of such helium-bearing natural gas or or helium-gas mixture for the purpose of extracting helium, together with the appropriate interest in pipelines, equipment, installations, facilities, personal or real property, including reserves, easements or other rights necessary or incident to the acquisition of such helium, natural gas, or mixture, but the condemnation of any such helium, helium-bearing natural gas, helium-gas mixture, shall be effected in the same manner and following the procedures established in section 167f(a) of this title, the just compensation for such condemnation to be measured by terms and prices determined to be commensurate with the fair market value, and in the temporary use of any helium-bearing natural gas or helium-gas mixture for the purpose of extracting helium the Secretary shall cause no delay in the delivery of natural gas to the owner, purchaser, or purchasers, thereof, except that required by the extractive processes;

(3) to construct or acquire by purchase, lease, exchange, gift or eminent domain, plants, wells, pipelines, compressor stations, camp buildings, and other

facilities, for the production, storage, purification, transportation, purchase, and sale of helium, helium-bearing natural gas, and helium-gas mixtures: and to acquire patents or rights therein and reports of experimentation and research used in connection with the properties acquired or useful in the Government's helium operations;

(4) to dispose of, by lease or sale, property, including wells, lands, or interests therein, not valuable for helium production, and oil, gas, and byproducts, of helium operations not needed for Government use, except that property determined by the Secretary to be "excess" within the meaning of section 3(e) of the Federal Property and Administrative Services Act of June 30, 1949, as amended, shall be disposed of in accordance with the provisions of that Act; and to issue leases to the surface of lands or structures thereon for grazing or other purposes when the same may be done without interfering with the production of helium; and

(5) to accept equipment, money, and other contributions from public and private sources and to prosecute projects in cooperation with other agencies, Federal, State, or private.

(b) *Helium on public domain.*

Any known helium-gas-bearing land on the public domain not covered at the time by leases or permits under the Mineral Lands Leasing Act of February 25, 1920, as amended, may be reserved for the purposes of this chapter, and any reservation of the ownership of helium may include the right to extract, or have extracted, such helium, under such rules and regulations as may be prescribed by the Secretary, from all gas produced from lands so permitted, leased, or otherwise granted for development, except that in the extraction of helium from gas produced

from such lands, it shall be extracted so as to cause no delay, except that required by the extraction process, in the delivery of gas produced from the well to the purchaser or purchasers thereof at the point of delivery specified in contracts for the purchase of such gas. If any reserved rights of ownership and extraction of helium are not exercised before production of any helium-bearing natural gas or any helium-gas mixture, the Secretary is authorized to acquire such helium in accordance with subsection (a)(2) of this section.

(c) *Contract price.*

All contracts and agreements made by the Secretary for the acquisition of helium from a private plant shall contain a provision precluding the plant owner from selling any helium to any purchaser other than the Secretary at a price lower than the lowest price paid by any Government agency for helium acquired from any private plant under any contract entered into pursuant to this section and outstanding at the time of such sale.

§ 167b. Production of helium; maintenance and operation of facilities; research.

The secretary is authorized to maintain and operate helium production and purification plants together with facilities and accessories thereto; to acquire, store, transport, sell, and conserve helium, helium-bearing natural gas, and helium-gas mixtures, to conduct exploration for and production of helium on and from the lands acquired, leased, or reserved; and to conduct or contract with public or private parties for experimentation and research to discover helium supplies and to improve processes and methods of helium production, purification, transportation, liquefaction, storage, and utilization: *Provided, however,* That all research contracted for, sponsored, cosponsored, or authorized under

authority of this chapter shall be provided for in such a manner that all information, uses, products, processes, patents and other developments resulting from such research developed by Government expenditure will (with such exceptions and limitations, if any, as the Secretary may find to be necessary in the interest of national defense) be available to the general public: *And provided further,* That nothing contained herein shall be construed as to deprive the owner of any background patent relating thereto to such rights as he may have thereunder.

§ 167c. Licensing.

(a) *Rules and regulations.*

Whenever the President determines that the defense, security, and general welfare of the United States requires such action, the Secretary shall issue such regulations as he deems necessary for the licensing of sales and transportation of helium in interstate commerce after extraction from helium-bearing natural gas or helium-gas mixtures. Thereafter it shall be unlawful for any person to sell or transfer helium in interstate commerce except in accordance with such regulations or pursuant to the terms of a license issued by the Secretary, or in accordance with the terms of a contract or agreement with the Secretary entered into pursuant to this chapter. For the purpose of this section, the term "helium" shall mean helium, after extraction from helium-bearing natural gas or helium-gas mixtures, in a refined or semirefined state suitable for use.

(b) *Terms; assignments; revocations.*

Each license shall be issued for a specified period to be determined by the Secretary, but not exceeding five years, and may be renewed by the Secretary upon the expiration of such period. No such license shall be issued to a person if in the opinion of the Secretary the issuance of a license to such person would be inimical to the defense and security

of the United States. No such license shall be assigned or otherwise transferred directly or indirectly except with the consent or approval of the Secretary in writing. Any such license may be revoked for any material false statement in the application for license, or for violation or a failure to comply with the terms and provisions of this chapter, the regulations issued by the Secretary pursuant thereto or the terms of the license.

(c) *Purpose.*

In issuing licenses under this section, the Secretary shall impose such regulations and terms of licenses as will permit him effectively to promote the common defense and security as well as the general welfare of the United States. The licensing authority herein granted shall be used solely for the purpose of preventing the transportation or sale of helium for end uses determined by the Secretary to be nonessential or wasteful, and any determination that any end use is nonessential or wasteful shall be published in the form of general regulations applicable to all transportation or sales of helium.

(d) *Suspension; reacquisition of supplies.*

Whenever Congress or the President declares that a war or national emergency exists, the Secretary is authorized to suspend any license granted under this chapter if in his judgment such suspension is necessary to the defense and security of the United States, and he is further authorized to take such steps as may be necessary to recapture or reacquire supplies of helium.

§ 167d. Sale of helium.

(a) *Purchase by Government Agencies.*

The Department of Defense, the Atomic Energy Commission, and other agencies of the Federal Government, to the extent that supplies are readily available, shall purchase all major requirements of helium from the Secretary.

(b) *Sales by the Secretary.*

The Secretary is authorized to sell helium for Federal, medical, scientific, and commercial uses in such quantities and under such terms and conditions as he determines.

(c) *Prices and determinations.*

Sales of helium by the Secretary shall be at prices established by him which shall be adequate to cover all costs incurred in carrying out the provisions of this chapter and to repay to the United States by deposit in the Treasury, together with interest as provided in subsection (d) of this section, the following:

(1) Within twenty-five years from September 13, 1960, the net capital and retained earnings of the helium production fund (established under section 3 of this Act prior to amendment by the Helium Act Amendments of 1960), determined by the Secretary as of September 13, 1960, plus any moneys expended thereafter by the Department of the Interior from funds provided in the Supplemental Appropriation Act, 1959, for construction of a helium plant at Keyes, Oklahoma;

(2) Within twenty-five years from the date of borrowing, all funds borrowed, as provided in section 167j of this chapter, to acquire and construct helium plants and facilities; and

(3) Within twenty-five years from September 13, 1960, unless the Secretary determines that said period should be extended for not more than ten years, all funds borrowed, as provided in section 167j of this title for all purposes other than those specified in clause (2) above.

(d) *Interest in price determinations.*

Compound interest on the amounts specified in clauses (1), (2), and (3) of subsection (c) of this section which

have not been paid to the Treasury shall be calculated annually at rates determined by the Secretary of the Treasury taking into consideration the current average market yields of outstanding marketable obligations of the United States having maturities comparable to the investments authorized by this chapter, except that the interest rate on the amounts specified in clause (1) of subsection (c) of this section shall be determined as of September 13, 1960, and the interest rate on the obligations specified in clauses (2) and (3) of subsection (c) as of the time of each borrowing.

(e) *Prices of sales for medical purposes; sales to non-Federal purchasers.*

Helium shall be sold for medical purposes at prices which will permit its general use therefor; and all sales of helium to non-Federal purchasers shall be upon condition that the Federal Government shall have a right to repurchase helium so sold that has not been lost or dissipated, when needed for Government use, under terms and at prices established by regulations.

(f) *Helium production fund.*

All moneys received under this chapter, including moneys from sale of helium or other products resulting from helium operations and from the sale of excess property shall be credited to the helium production fund, which shall be available without fiscal year limitation, for carrying out the provisions of this chapter, including any research relating to helium carried out by the Department of the Interior. Amounts accumulating in said fund in excess of amounts the Secretary deems necessary to carry out this chapter and contracts negotiated hereunder shall be paid to the Treasury and credited against the amounts required to be repaid to the Treasury under subsection (c) of this section.

§ 167e. Intragovernmental cooperation.

The Secretary of Defense and the Chairman of the Atomic Energy Commission may each designate representatives to cooperate with the Secretary in carrying out the purposes of this chapter, and shall have complete right of access to plants, data, and accounts.

§ 167f. Condemnation proceedings.

(a) Proceedings for the condemnation of any property under section 167a of this title shall be instituted and maintained pursuant to the provisions of section 257 of Title 40, and sections 1358 and 1403 of Title 28, of the United States Code, or any other Federal statute applicable to the acquisition of real property of eminent domain. Sections 258a to 258f of Title 40 shall be applicable to any such proceedings. Wherever the words "real property", "realty", "land", "easement", "right-of-way", or words of similar meaning, are used in such code provisions or Acts relating to procedure, jurisdiction, and venue, they shall be deemed, for the purposes of this chapter, to include any personal property authorized to be acquired hereunder.

(b) In the event of disposal under section 167a(a)(4) of this title of any property acquired by eminent domain pursuant to this chapter, the former owner or successor in interest of the rights therein shall have the preferential right to reacquire such property on terms as favorable as those terms whereby disposition may be made under such section.

§ 167g. Promulgation of rules and regulations.

The Secretary is authorized to establish and promulgate such rules and regulations, as are consistent with the directions of this chapter and are necessary to carry out the provisions hereof.

§ 167h. Administrative procedure.

(a) The provisions of the Administrative Procedure Act of June 11, 1946, as amended, shall apply to any agency proceeding and any agency action taken under this chapter, including the issuance of rules and regulations, and the terms "agency proceeding" and "agency action" shall have the meaning specified in the Administrative Procedure Act.

(b) In any proceeding under this chapter for the granting, suspending, revoking, or amending of any license, or application to transfer control thereof, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, the Secretary shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. Any final order entered in any such proceeding shall be subject to judicial review in the manner prescribed in sections 1031 to 1042 of Title 5, and to the provisions of section 1009 of Title 5.

§ 167i. Exclusion from the Natural Gas Act.

The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 717c and 717d of Title 15, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transporta-

tion or storage divided and allocated to helium on a volumetric basis.

§ 167j. Loans and obligations.

(a) The Secretary is authorized to borrow annually from the Treasury and credit to the fund established under section 167d(f) of this title such amounts as may be authorized in the initial appropriation Act and which may be increased from time to time in appropriation Acts and as are necessary to carry out the provisions of this chapter and contractual obligations hereunder.

(b) For the purpose of this section the Secretary may issue to the Secretary of the Treasury notes, debentures, bonds, or other obligations to be redeemable at the option of the Secretary before maturity in such manner as may be stipulated in such obligations. The Secretary of the Treasury is authorized and directed to purchase any obligations issued by the Secretary under authority of this section and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under the Second Liberty Bond Act, as amended, are extended to include any purchases of obligations of the Secretary hereunder.

§ 167k. Violations; penalties.

Whoever willfully violates, attempts to violate, or conspires to violate, any provision of this chapter or any regulation or order issued or any terms of a license granted thereunder shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both, except that whoever commits such an offense with intent to injure the United States or with intent to secure an advantage to any foreign nation, shall upon conviction thereof, be punished by a fine of not

more than $20,000 or by imprisonment for not more than twenty years, or both.

§ 167*l*. Injunctions.

Whenever in the judgment of the Secretary any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter, or any regulation or order issued or any term of a license granted thereunder, any such act or practice may be enjoined by any district court having jurisdiction of such person, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

§ 167m. Individual enterprise in developing helium.

It is the sense of the Congress that it is in the national interest to foster and encourage individual enterprise in the development and distribution of supplies of helium, and at the same time provide, within economic limits, through the administration of this chapter, a sustained supply of helium which, together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Government activities.

§ 167n. Reports.

The Secretary of the Interior is directed to report annually to the Congress on the matters contained in this chapter.

* * * * * * * * * *

Administrative Procedure Act, 50 U.S.C. §§ 701-706 (1970)

§ 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review.

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all

necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 73-1169 & 73-1449

September Term — October 19, 1973

Before: Honorable Jean F. Breitenstein, Senior Circuit Judge Honorable Delmas C. Hill and Honorable William E. Doyle, Circuit Judges.

NATIONAL HELIUM CORPORATION, *Plaintiff-Appellee,*

and

PHILLIPS PETROLEUM COMPANY,

and

CITIES SERVICE HELEX, INC., *Intervenor-Plaintiffs-Appellees,*

v.

ROGERS C. B. MORTON, Secretary of the Interior, and ELBURT F. OSBORNE, Director, Bureau of Mines, Department of the Interior, *Defendants-Appellants.*

These causes came on to be heard on the records on appeal from the U.S. District Court for the District of Kansas and were argued by counsel.

On consideration whereof, it is ordered that the judgment of the U.S. District Court is reversed and the causes remanded with directions to dismiss the action in accordance with the opinion of this Court. Breitenstein, Circuit Judge, concurs.

s/ .....
Howard K. Phillips, Clerk
By: Lavon M. Irlbeck

LIBRARY
SUPREME COURT, U. S.

SUPREME COURT, U.S.
FILED
APR 17 197
MICHAEL RODAK, JR.

No. 73-1120

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL HELIUM CORPORATION, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
CARLA A. HILLS,
Assistant Attorney General,
HARRY R. SACHSE,
Assistant to the Solicitor General,
MORTON HOLLANDER,
RAYMOND D. BATTOCCHI,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	8
Conclusion	13

CITATIONS

Cases:	
Davis v. *Morton*, 469 F. 2d 593	11
Environmental Defense Fund v. *Armstrong*, 487 F. 2d 814, petition for writ of certiorari pending, No. 73–1179	9
Environmental Defense Fund v. *Corps of Engineers*, 470 F. 2d 289, certiorari *denied*, 412 U.S. 931	11
Iowa Citizens v. *Volpe*, 487 F. 2d 849	9
Scientists' Institute for Public Information, Inc. v. *Atomic Energy Commission*, 481 F. 2d 1079	7
Sierra Club v. *Froehlke*, 486 F. 2d 946	9, 11
Statutes:	
Administrative Procedure Act, 5 U.S.C. 701, *et seq.*	2
5 U.S.C. 702	2
5 U.S.C. 703	2
5 U.S.C. 704	2
5 U.S.C. 706	2

Statutes—Continued

Helium Act, 43 Stat. 1110, *et seq.*, as amended by the Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C. 167, *et seq.*:

	Page
50 U.S.C. 167a	2, 10
50 U.S.C. 167m	3
National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4331, *et seq.*	2, 5
Section 101	6, 12
Miscellaneous:	
S. Rep. No. 1814 (Part 1), 86th Cong., 2d Sess.	10

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1120

NATIONAL HELIUM CORPORATION, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–19a)[1] is reported at 486 F.2d 995. The opinion of the district court (App. 19a–73a) is reported at 361 F. Supp. 78.

JURISDICTION

The judgment of the court of appeals (App. 140a) was entered on October 19, 1973. The petition for a writ of certiorari was filed on January 17, 1974. This

[1] All "App." references are to the separately bound Appendix to the petition.

Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the environmental impact statement in this case was adequate.

2. Whether the court of appeals correctly ruled that the Secretary of the Interior acted in accordance with the Helium Act and contract terms in cancelling certain contracts for the production of helium which the Secretary had found to be in excess of government needs.

3. Whether the determination of the Secretary of the Interior to cancel the contracts in this case was proper.

STATUTES INVOLVED

The relevant provisions of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4331, *et seq.*, the Helium Act, 43 Stat. 1110, as amended, 74 Stat. 918, 50 U.S.C. 167, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 702, 703, 704, 706, are set forth in the Appendix to the Petition (pp. 120a–139a).

STATEMENT

The Helium Act Amendments of 1960, 50 U.S.C. 167 *et seq.*, authorized the Secretary of the Interior to enter into "contracts * * * for the acquisition * * * of helium * * * for such periods, not exceeding twenty-five years, as may be necessary to accomplish the purpose of the" Act. 50 U.S.C. 167a(a)(2). The Act's stated purpose is "to * * * provide, within economic limits, * * * a sustained supply of helium which,

together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Government activities." 50 U.S.C. 167m. Acting pursuant to this authority, the Secretary in 1961 entered into helium purchase contracts with four companies.[2] The contracts, which would expire by their own terms in 1983, contained clauses permitting earlier termination if "in the opinion of the Secretary of the Interior, the discovery of large new helium resources or a substantial diminution in helium requirements or any circumstances of similar nature should occur which would make the continued purchase of helium * * * unnecessary to accomplish the purposes of the Act * * *" (App. 75a). Under the four contracts, the government received an annual average of 3.126 billion cubic feet of helium at an annual cost of more than $40,000,000 (App. 3a, 102a).

From fiscal 1962,[3] when total government helium requirements were 530 million cubic feet (mcf), government demand continued to rise, reaching a peak of 684 mcf in fiscal 1966. Government demand began declining in fiscal 1967 and has declined each year since, reaching the level of 280 mcf in fiscal 1972 (App. 3a, 108a).[4]

---

[2] These consisted of the three petitioners and the Northern Helex Co., a non-party to this action. See App. 30a.

[3] The four contracts were entered into in fiscal 1962.

[4] 1972 is the most recent fiscal year for which statistics are found in the record. The Helium Act authorizes purchases "* * * for essential Government activities." 50 U.S.C. 167m. These annual government demand figures include both "essential Government" requirements and non-essential government requirements. In addition, non-government requirements have also declined dramatically. See table at App. 112a. See also App. 108a.

Under the contracts, the government has stored about 35 *billion* cubic feet of helium (App. 101a). During the entire purchase period, the Bureau of Mines, a governmental agency, has produced enough helium to satisfy all government requirements, and the government has not used any of the helium supplied by petitioners (App. 3a). The Secretary estimates that the present assured supply of helium available to the government after cancellation of these contracts is more than six times that necessary to satisfy essential government helium requirements through the year 2000 (App. 111a).

In January 1971, Under Secretary of the Interior Russell determined that a substantial diminution in helium requirements had occurred. Additionally, based on the discovery of substantial unexploited helium deposits in Wyoming and elsewhere, he also determined that there had been discovery of significant new helium resources (App. 117a). Accordingly, since the cost to the government of continuing to purchase now unneeded helium was considerable, he notified the contractors that he was invoking the termination clauses of the contracts (App. 75a–76a, 108a).[5]

Petitioners then bought this suit seeking declaratory and injunctive relief. The district judge, finding that the proposed termination, without benefit of an environmental impact statement, was likely to be deemed insufficient to satisfy the requirements of the National

[5] These actions were taken by Under Secretary Russell under standing delegations of authority at a time when the nominee for Secretary of the Interior had not yet been confirmed.

Environmental Policy Act, the Helium Act and the contracts in question, enjoined respondents from terminating the contracts (App. 95a–96a). The Secretary appealed, arguing that the cancellation of the contracts had no substantial effect on the environment. The court of appeals ruled that the district court had properly enjoined the proposed action because the Secretary had not complied with the requirements of NEPA (App. 73a, *et seq.*). The court also determined, however, that, apart from NEPA, the Secretary was acting within his proper discretion when he terminated the contracts (App. 74a–76a). None of the parties petitioned for certiorari.

Following this decision, the Department of the Interior undertook to comply with the court of appeals' mandate. In May 1972 the Department issued a draft Environmental Statement and distributed it broadly for comment (see App. 33a). In November 1972, after considering the numerous comments received (including those from petitioners), the Department issued a revised and expanded Final Environmental Impact Statement (App. 33a–34a).[6] Thereafter, the Secretary again cancelled the contracts, with an extensive written report covering the environmental (App. 97a–104a), economic and contractual (App. 104a–119a) reasons for his decision.

Petitioners then filed amended complaints in the district court, again challenging the Secretary's deci-

[6] A copy of the Final Environmental Statement, containing, with appendices, some 376 pages, has been lodged with the Clerk.

sion to terminate as inconsistent with NEPA, the Helium Act, the Administrative Procedure Act, and the contracts themselves. The district court, while discussing the contract and Helium Act issues, limited its holding to the Secretary's compliance with NEPA. It held that it had jurisdiction to review both the adequacy of the impact statement and, apparently under Section 101 of NEPA, 42 U.S.C. 4331, the substantive validity of the Secretary's decision (App. 45a, 49a, 72a). The district court held that the standard for review of each question is whether the Secretary's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *" (App. 44a). It then found that the discussion in the impact statement was deficient in a number of particulars and that, accordingly, the Secretary could not have weighed the issues involved in his decision to cancel as required by law. It remanded the case to the Secretary for further consideration in light of its opinion (App. 47a). The Secretary again appealed, and the court of appeals reversed. It adhered to its earlier decision that the Secretary, unless he had violated NEPA, acted lawfully in terminating the contracts (App. 6a–8a).

As to NEPA, the court of appeals stated that in reviewing the impact statement, rather than applying the arbitrary or capricious standard appropriate for judging agency action, the district court should have followed the more particular standards worked out by the courts of appeals for reviewing impact statements (App. 9a–10a). The court quoted with approval the following standard articulated in *Scientists' Institute for*

Public Information, Inc. v. *Atomic Energy Commission*, 481 F. 2d 1079, 1092 (C.A.D.C.):

> * * * [I]f the Commission's environmental survey is prepared and issued in accordance with NEPA procedures, and if the Commission makes a good faith effort in the survey to describe the reasonably foreseeable environmental impact of the program, alternatives to the program and their reasonably foreseeable environmental impact, and the irreversible and irretrievable commitment of resources the program involves, we see no reason why the survey will not fully satisfy the requirements of Section 102(C). [App. 10a–11a.]

The court summarized its discussion of the standard of review by stating that in its view the review of an impact statement is limited to the following (App. 12a):

> (1) Whether FES [the Final Environmental Statement] discusses all of the five procedural requirements of NEPA.
>
> (2) Whether the environmental impact statement constitutes an objective good faith compliance with the demands of NEPA.
>
> (3) Whether the statement contains a reasonable discussion of the subject matter involved in the five required areas.

Applying this test to the impact statement before it (App. 12a–16a), the court concluded that the statement satisfied the requirements of NEPA:

> * * * [W]e conclude that the statement is fully acceptable. It adequately discusses future needs and future supplies. It weighs the costs now as

> opposed to the future. It is a comprehensive and thorough document. We disagree with the derogatory comments of the parties and the district court regarding it. [App. 16a.]

Having found the environmental statement to be proper, and having previously found the Secretary's cancellation to be in accord with the Helium Act, the court, without specifically mentioning review under NEPA of the Secretary's substantive decision, reversed the judgment of the district court and remanded with directions to dismiss the action (App. 17a). The concurring judge, while stating that his "differences with the majority [may] go to form rather than substance" (App. 17a), specifically ruled that the Secretary had "balanced the environmental factors with the other pertinent factors" and that his final action in doing so "was neither arbitrary, capricious, nor an abuse of discretion" (App. 19a).

ARGUMENT

1. The standard of review utilized by the court of appeals in reviewing the impact statement was correct and is not in conflict with the standards applied in other circuits. The court of appeals held that in reviewing an agency's undertaking to comply with NEPA a court must require that the agency "do more than mechanically pursue the procedural standards" (App. 10a). It must examine the statement to see whether it in objective good faith discusses each of the environmental matters required by the Act (App. 10a–12a; see p. 7, *supra*). This test, based on the decisions of the Court of Appeals for the District of Columbia Cir-

cuit, is substantially in accord with the standard of review in other circuits. See, *e.g.*, *Sierra Club* v. *Froehlke*, 486 F. 2d 946 (C.A. 7); *Iowa Citizens* v. *Volpe*, 487 F. 2d 849 (C.A. 8); *Environmental Defense Fund* v. *Armstrong*, 487 F. 2d 814 (C.A. 9), petition for a writ of certiorari pending, No. 73–1179. Seeking to show a conflict among the circuits, petitioners compare the standard followed by the court of appeals in reviewing the impact statement with discussions in other cases concerning the standard appropriate for review of agency substantive decisions (Pet. 22–24). The majority opinion below, however, properly distinguishes those cases (App. 11a, n. 5).

The standard enunciated by the court of appeals, moreover, is no less stringent than that enunciated by the district court. Requiring that an impact statement not be "arbitrary or capricious," the district court's test seems, if anything, less strict than requiring the statement to be a compliance in "objective good faith" with the requirements of the Act. The real difference between the district court decision and that of the court of appeals, in our view, is in their respective *evaluation* of the government's compliance with NEPA, not in the standard of review. As the court of appeals stated in referring to the impact statement:

> It is a comprehensive and thorough document. We disagree with the derogatory comments of the parties and the district court regarding it (App. 16a).

This difference in evaluation of a complex factual issue is not a matter requiring further review by this Court.

2. Contrary to petitioners' contention (see Pet. 15–22), the court of appeals correctly reaffirmed its earlier determination that the Secretary did not violate the Helium Act, and was acting within his contractual rights, in terminating these contracts.[7] The Helium Act authorizes, but does not require, the Secretary to enter into helium purchase contracts. The Secretary, in choosing to enter into such contracts, expressly reserved the right to terminate them if, in his opinion, large new discoveries of helium or diminished requirements or circumstances of a similar nature should make the purchases unnecessary to accomplish the purposes of the Act (see p. 3 *supra*). As we have shown (pp. 3–4, *supra*), these conditions occurred and the Secretary chose to exercise his cancellation power.[8] In view of the enormous quantities of stored helium, important new discoveries and decreased demand (see App. 3a, 108a–110a), the Secretary was well within statutory and contractual bounds in can-

[7] Petitioners incorrectly refer to the termination of these contracts as the "decision to terminate the helium conservation program" (Pet. 16). The Helium Act, 50 U.S.C. 167a(a), grants authority for the "conserving, producing, buying and selling" of helium. These contracts involve only the government's present purchase of helium from private producers. Production of the Bureau of Mines and private production are not curtailed. Nor is the government precluded from again purchasing helium if projected requirements should substantially change.

[8] The Senate Report (No. 1814 (Pt. 1), 86th Cong., 2d Sess. at p. 2 accompanying the 1960 Helium Act amendments stated that the "upward trend in helium demand in all fields is expected to continue." This expectation, as we have shown, proved unfounded.

celling these contracts costing the government approximately $100,000.00 per day for unneeded helium.[9]

3. The court of appeals, after reviewing the impact statement and after finding no violation of the Helium Act or the contracts, reversed the decision of the district court and remanded the case with directions to dismiss the action (App. 17a). The court thus *sub silentio* rejected petitioners' request to overturn the substantive decision of the Secretary as contrary to Section 101 of NEPA. It is possible to read this decision, as petitioners do, as a holding that NEPA, standing alone, provides no basis for substantive review of agency action. In our view, however, it is also possible to read the decision as a determination that the agency action in this case, as demonstrated by the impact statement and the written reasons for termination prepared by the Secretary (App. 97a–119a), was unquestionably not arbitrary or capricious.[10] If the decision is interpreted as petitioners argue, it conflicts with decisions in other circuits that have interpreted NEPA as authorizing substantive review of agency decisions.[11]

---

[9] The cost to the government is $40,000,000 per year (App. 3a, 102a).

[10] See the court of appeals' previous opinion in this case at App. 82a, as well as the concurring judge's view summarized at p. 8, *supra*. See, also, *Davis* v. *Morton*, 469 F. 2d 593, 596 (C.A. 10), quoted by the district court below at App. 49a.

[11] *E.g.*, *Sierra Club* v. *Froehlke*, 486 F. 2d 946 (C.A. 7); *Environmental Defense Fund* v. *Corps of Engineers*, 470 F. 2d 289 (C.A. 8), certiorari denied, 412 U.S. 931 (see Pet. 11–15).

There is, in any event, no need for this Court to resolve this possible conflict at this time.

The present case uniquely concerns a contract cancellation under a special statute. Moreover, the Secretary, in addition to the environmental statement, has set forth in a comprehensive document the environmental and non-environmental reasons for his decision to cancel (App. 97a–119a). That document demonstrates that the termination of these contracts was a classic judgmental choice, with substantial arguments supporting the Secretary's decision. Accordingly, as the concurring judge below explicitly held (see p. 8, *supra*), application of the "arbitrary or capricious" standard of review under Section 101 of NEPA to the merits of the Secretary's decision would clearly result in sustaining the decision. For Section 101, while requiring that environmental factors be given weight in federal agency decisionmaking, does not dictate what decision shall be made when environmental considerations are weighed against non-environmental considerations. It does not preclude government decisions based on the judgment that the non-environmental advantages of a decision outweigh its adverse environmental effects. And here, in light of the large quantity of helium already stored, the decreasing demand for helium, the cost of continued purchase, and the speculativeness of any environmental harm, the Secretary's decision to act economically in terminating purchase contracts was hardly arbitrary or capricious. Seen in the light most favorable to the petitioners, the Secretary was charged with making a decision as to

which reasonable men could differ. The decision of the court of appeals is thus correct in sustaining the Secretary's decision, and the factual and legal context of this case is not likely to recur.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
HARRY R. SACHSE,
Assistant to the Solicitor General.
MORTON HOLLANDER,
RAYMOND D. BATTOCCHI,
Attorneys.

APRIL 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

No. 73-1120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL HELIUM CORPORATION, CITIES SERVICE HELIUM, INC., PHILLIPS PETROLEUM COMPANY,

Petitioners,

v.

ROGERS C. B. MORTON, Secretary of the Interior, and ELMER F. OSBORN, Director, Bureau of Mines, Department of the Interior,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

WILLIAM H. ALLEN
EUGENE D. GULLAND
COVINGTON & BURLING
888 Sixteenth Street, N. W.
Washington, D. C. 20006

JOSEPH W. KENNEDY
MORRIS, LAING, EVANS,
BROCK & KENNEDY,
CHARTERED
Suite 430
200 West Douglas
Wichita, Kansas 67202

Attorneys for
Petitioner, Phillips
Petroleum Company

Of Counsel:

R. PRICE HOWARD
Senior Counsel
Phillips Petroleum
Company
Bartlesville, Oklahoma 74003

ROBERT L. ACKERLY
RAYMOND S. E. PUSHKAR
SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C., 20006

WILLIAM S. RICHARDSON
ADAMS, JONES, ROBINSON AND
MALONE, CHARTERED
P. O. Box 1034
Wichita, Kansas 67201

DANIEL R. HOPKINS
P. O. Box 25128
Oklahoma City, Oklahoma
73125

Attorneys for
Petitioner, Cities Service
Helex, Inc.

May 1974

CITATIONS

Page

CASES:

Davis v. *Morton*, 469 F.2d 593 (10th Cir. 1972)..... 3

Environmental Defense Fund v. *Armstrong*, 487 F.2d 814 (9th Cir. 1973), pet. for cert. pending, No. 73-1179 6-7

Life of the Land v. *Brinegar*, 485 F.2d 460 (9th Cir. 1973) 7

Silva v. *Lynn*, 482 F.2d 1282 (1st Cir. 1973)..... 7

STATUTES:

Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (1970) 5, 6, 7

Helium Act, 43 Stat. 1110, as amended, 74 Stat. 918, 50 U.S.C. §§ 167 *et seq.* (1970) 5

National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. §§ 4321 *et seq.* (1970) 2, 3, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1120

NATIONAL HELIUM CORPORATION, CITIES SERVICE HELEX, INC., PHILLIPS PETROLEUM COMPANY,
Petitioners,

v.

ROGERS C. B. MORTON, Secretary of the Interior, and ELBURT F. OSBORN, Director, Bureau of Mines, Department of the Interior,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONERS

The respondents' argument that certiorari should be denied rests in large part on their total misconception of what the court below held. Their argument is no

proper basis for this Court's not deciding the important issues presented on the record here concerning the standard and scope of judicial review of an agency's substantive and procedural compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, and the availability of judicial review of an agency's substantive decision under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*

1. The respondents acknowledge that, if the court below rejected judicial review of the action of the Secretary of the Interior terminating the helium conservation program for compliance with the substantive dictates of the National Environmental Policy Act, its decision conflicts with those of other circuits. (Br. in Opp. 11.) There is no doubt that the court rejected outright judicial review of an agency's substantive compliance with NEPA, that is, judicial review of the Secretary's decision on the merits to determine whether he complied with the substance of NEPA. This rejection is the basis for the first question presented in the petition. (See Pet. 11-15.) The court held that "we conceive of the review of the Secretary's action as being strictly limited to compliance with the requirement of the environmental impact statement," which includes the Secretary's consideration of the statement. (App. 8a.) Despite this clear holding, the respondents argue that it is possible to read the decision as a determination on the merits that the Secretary's action "was unquestionably not arbitrary or capricious." (Br. in Opp. 11.)

As reasons for not taking the court at its word concerning the strict limits of its review, the respondents

cite references that are not even remotely supportive of their position. [1]

Respondents then argue that in any event there is no need for the Court to resolve the conflict over the availability of substantive NEPA review at this time. (Br. in Opp. 12.) This assertion is apparently based on the paragraph that follows it, which is a distillation of the Secretary's own statement of reasons for terminating the conservation program and not of any analysis found in the Court of Appeals' decision sustaining his action. This is obviously not the place for an extended discussion of the merits of the Secretary's decision. Petitioners would say merely that respondents' argument grossly distorts the record, the nature of the choice that the Secretary had to make and the nature of his decision.

Lest this distortion be allowed to stand, petitioners add this much: The record below demonstrates that

---

[1] Respondents cite (Br. in Opp. 11 n.10):

(a) a page from the court's *prior* 1971 opinion in this case (App. 82a), which does not and could not indicate any view on the question of the availability of substantive NEPA review, since at that stage in the suit NEPA had been wholly ignored by respondents and an impact statement not even prepared; (b) an opinion in another case, *Davis* v. *Morton*, 469 F.2d 593 (10th Cir. 1972), in which the court said that agencies were bound to follow both the "substantive" and the "procedural" mandates of NEPA, but in which the only NEPA issue before the court was whether a particular action was major federal action so as to call for an impact statement; and (c) the opinion of the concurring judge below, which is significant for the very fact that the majority did not follow his lead in passing on whether the Secretary "balanced environmental factors with other pertinent factors" and on that basis judging whether the Secretary's action was arbitrary, capricious or an abuse of discretion (App. 19a).

the only economical source of helium today is natural gas. Contrary to what the Secretary said and what his counsel now assert, there have not been any significant discoveries of natural gas rich in helium since the helium conservation program started. Helium-rich natural gas is concentrated in the fields of Texas, Oklahoma and Kansas from which the helium contractors have been extracting helium. The fields are relatively old, extensively developed ones; the natural gas in them is being used as fuel and will be exhausted well before the end of the century. There is in storage under the conservation program no more than the quantity of helium that was expected to be in storage at this time when the program started. Current demand for helium has slackened, but the key point is that helium remains essential to new environmentally favorable means of generating and transmitting power. This nation will find it necessary to turn to such means as fossil fuel sources are depleted. When the helium-bearing natural gas and the stored helium are exhausted, the only source of helium for use in such devices as superconductors of electricity and magnetohydrodynamic and nuclear fission power generators will be the atmosphere, and helium can be extracted from the atmosphere only at untold monetary and environmental cost.

The refusal of the Court of Appeals to decide whether the Secretary in his decision adequately weighed such factors as these is thus not of mere academic interest, as respondents seem to contend. This is a case in which it made a difference since the impact of the Court of Appeals' decision is completely to bar judicial review of the factual basis of the Secretary's decision to terminate a major conservation program mandated by the Congress involving a valuable and wasting natural re-

source to which NEPA obviously applies. Thus, the case is an altogether appropriate vehicle for resolving the critical question whether courts are empowered to review agency decisions for substantive compliance with the requirements of NEPA.

2. Respondents assert, without citation to the record or any authority, that the court below "correctly reaffirmed its earlier determination that the Secretary did not violate the Helium Act . . . ." (Br. in Opp. 10.) This bald assertion ignores the plainest possible statement of the Court of Appeals, which rejected "plaintiffs' argument that review of the termination is permissible under the Administrative Procedure Act." (App. 8a.) It was with this summary declaration that the Court of Appeals disposed of the case once and for all and remanded it to the District Court for dismissal, foreclosing forever all judicial inquiry into matters that the District Court, on its view of NEPA's requirements, did not need to reach—matters concerning the meaning and legislative history of the 1960 Helium Act Amendments and whether the Secretary's decision to terminate the conservation program contracts properly heeded the goals of the legislation.[2]

---

[2] As we pointed out in our petition (Pet. 18), the Court of Appeals stated elsewhere that it did not "perceive any violation of the 1960 Helium Act Amendments" (App. 8a), and it earlier said that the matter of termination was left entirely to the discretion of the Secretary "and he was within his rights in terminating the contracts." (App. 7a.) But these afterthoughts cannot change the basis of the court's disposition of the case as unreviewable except on narrow NEPA procedural grounds, nor can they substitute for the broad ranging inquiry into the record required by the Administrative Procedure Act in determinations that are reviewable.

The important questions arising from the summary denial of judicial review under the APA, which are embraced in the second question presented in the petition, are not downed by respondents' mere assertion. These questions include: (a) whether the termination of the conservation program was so far committed to the Secretary's discretion that the case falls within the narrow exception to the APA judicial review provisions, 5 U.S.C. § 706, for discretionary agency action (a proposition that the court below may have meant to advance but that respondents have not embraced and cannot logically embrace); and (b) whether sovereign immunity barred review on non-NEPA grounds or whether, on the other hand, as other courts of appeals have held, the judicial review provisions of the APA constitute a waiver of sovereign immunity for cases within the scope of the Act (Pet. 15-22).

3. With respect to the third question raised in the petition, pertaining to the erroneous standard that the Court of Appeals applied in reviewing the one thing it did review, procedural compliance with NEPA, respondents in their brief in opposition simply ignore the court's own statement that it looked only for "an objective good faith effort to comply with the statutory procedural requirements." (App. 10a.) Judges of the courts of appeals with whose NEPA decisions respondents argue that this standard is in accord (Br. in Opp. 8-9) would no doubt be as surprised as anyone at the thought that they had expressed themselves as satisfied with a mere "effort" at compliance, in whatever good faith such an effort may have been made. Respondents erroneously cite as consistent with the view of the court below, *Environmental Defense Fund* v. *Armstrong,* 487 F.2d 814 (9th Cir. 1973), pet. for

cert. pending, No. 73-1179. That case clearly holds the proper standard for review of impact statements to be the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A), citing *Life of the Land* v. *Brinegar,* 485 F.2d 460 (9th Cir. 1973) and *Silva* v. *Lynn,* 482 F.2d 1282 (1st Cir. 1973). 487 F.2d at 817. The arbitrary and capricious standard is the standard of review applied by the District Court below and expressly rejected by the Court of Appeals (App. 9a-10a). The *Armstrong* decision thus presents a further reason for granting the writ in this case. The concurring judge recognized the conflict among the circuits on the question of the standard of review of impact statements (App. 18a), and the *Armstrong* decision is but another example of that conflict.

Respondents have not offered any compelling reasons for denying review of the important and far-reaching questions presented in this case. The petition should be granted.

Respectfully submitted,

Of Counsel:

WENDELL J. DOGGETT
General Counsel &
Secretary
National Helium
Corporation
P. O. Box 1642
Houston, Texas 77001

ROBERT L. ACKERLY
RAYMOND S. E. PUSHKAR
SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C. 20006

EMMET A. BLAES
JOCHEMS, SARGENT & BLAES
200 East First Street
Wichita, Kansas 67201

Attorneys for
Petitioner, National
Helium Corporation

(Counsel continued on following page.)

Of Counsel:

R. PRICE HOWARD
Senior Counsel
Phillips Petroleum
Company
Bartlesville, Oklahoma 74003

WILLIAM H. ALLEN
EUGENE D. GULLAND
COVINGTON & BURLING
888 Sixteenth Street, N. W.
Washington, D. C. 20006

JOSEPH W. KENNEDY
MORRIS, LAING, EVANS,
BROCK & KENNEDY,
CHARTERED
Suite 430
200 West Douglas
Wichita, Kansas 67202

Attorneys for
Petitioner, Phillips
Petroleum Company

ROBERT L. ACKERLY
RAYMOND S. E. PUSHKAR
SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C., 20006

WILLIAM S. RICHARDSON
ADAMS, JONES, ROBINSON AND
MALONE, CHARTERED
P. O. Box 1034
Wichita, Kansas 67201

DANIEL R. HOPKINS
P. O. Box 25128
Oklahoma City, Oklahoma
73125

Attorneys for
Petitioner, Cities Service
Helex, Inc.

May 1974